Naval War College Review

Volume 22
Number 1 *January*

Article 1

1969

January 1969 Full Issue

The U.S. Naval War College

NAVAL WAR COLLEGE REVIEW

January 1969

. . . International Law

. . . Flag Selection Criteria

FOREWORD

The *Naval War College Review* was established in 1948 by the Chief of Naval Personnel in order that officers of the service might receive some of the educational benefits available to the resident students at the Naval War College.

The material contained in the *Review* is for the professional education of its readers. The frank remarks and personal opinions of the lecturers and authors are presented with the understanding that they will not be quoted without permission. The remarks and opinions shall not be published nor quoted publicly, as a whole or in part, without specific clearance in each instance with the lecturer or author and the Naval War College.

Lectures are selected on the basis of favorable reception by Naval War College audiences, usefulness to servicewide readership, and timeliness. Research papers are selected on the basis of professional interest to readers.

The thoughts and opinions expressed in this publication are those of the lecturers and authors, and are not necessarily those of the Navy Department nor of the Naval War College.

Cover photograph of the World Court (April 1961) courtesy of Judge Philip C. Jessup. Left to right, first row, M. Badawi, Judge Alfaro (Vice-President), M. Winiarski (President), M. Basdevant, M. Moreno Quintana; second row, Judge Wellington Koo, M. Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice; third row, Judge Tanaka, Judge Jessup, M. Bustamante y Rivero, M. Morelli, Judge Koretsky, M. Garnier Coignet (Registrar).

CONTENTS

Volume XXI, Number 5 January 1969

EDITORIAL BOARD

CHALLENGE!

In a country full of lawyers and politicians, with a government possessing a President, Secretary of State, and a large corps of ambassadors and foreign ministers, it may be asked doubtfully why naval officers should give time to international law. The reply is that in this extensive system of functionaries the naval admiral or captain is incidentally one; and that, in international law as in strategy and tactics, he must know the doctrine of his country. In emergencies, not infrequent, he has to act for his superior, without orders in the spirit and manner his superior would desire. If in war, the war may be complicated by a dangerous foreign dispute arising from action involving neutral rights; or, on the other hand, a neutral unright may be tolerated to the disadvantage of the national cause. In peace, injudicious action may precipitate hostilities; or injudicious inaction may permit infringement of American rights, of persons or of property.

--Mahan: *Armaments and Arbitration,* 1912

In the 55 years since Admiral Mahan penned the words above, the Naval War College has continued to include in an increasingly demanding curriculum the study of international law. This year students in all three resident schools, Naval Warfare, Command and Staff, and the Naval Command Course, heard a series of 13 lectures by some of the foremost international law professors and practitioners from this nation and Canada. The lectures were directed toward those areas of primary interest to the naval officer--the law of the sea and the law relating to the use of force. In five seminar periods the students were required to analyze complex international law problems and apply the relevant principles of international law in reaching a solution. As in the past, the seminars were conducted by skilled professional international lawyers, both civilian and military, whose insight and personal competence greatly enhanced the character and substance of our discussions.

Why should the Naval War College, alone among the service colleges, place such emphasis on the study of international law? Part of the answer will be found in the quotation from Admiral Mahan. If one is to command a man-of-war on the high seas, where to a substantial degree international law is the only law, the necessity for an awareness of and appreciation for the subject is rather obvious. In addition, the interrelationship of legal, political, economic, and social factors which are operative on a global scale and the increasing significance of our international commitments require a clear understanding of the rules governing the relations between states. Developments on the international scene dictate that we provide our officers with an understanding of how other nations view international law. The Soviet Union, as it expands its maritime fleet and projects its naval power to distant parts of the world, is but one example of the changes that are taking place.

In this regard, it is of interest to note

that whereas in the past the Soviets claimed jurisdiction over broad reaches of water areas such as the Barents Sea, today their national interests should dictate a different policy. With their adoption of a worldwide maritime strategy, they should recognize the serious consequences of broad territorial sea claims upon the concepts of freedom of the seas and innocent passage.

There are those who maintain that modern communications have rendered obsolete the words of Admiral Mahan, that such communications have made it possible to obtain professional legal advice almost instantaneously. Communications systems, no matter how sophisticated, are not absolutely reliable. In addition, just the speed of events alone may lead to a situation where it is not possible to obtain the guidance required. The *Pueblo* and *Liberty* cases are dramatic examples in point. More importantly, it must be remembered that direction in handling a problem that may be provided a commander "on the scene" will be of little value if the problem has not been correctly analyzed, evaluated, and reported by him. Accurate analysis of a factual situation will depend heavily upon a clear understanding of the legal issues involved. It is this that we hope to impart to our students; an appreciation of the role of international law, including an appreciation of its limitations in the contemporary scheme of events, and a capability to recognize the legal issues that may confront them in their future careers.

Proud as we are of our International Law resident program, we are equally proud of our International Law "Blue Books." International law has been included in our course of instruction since the lectures to the first class in 1885 by Professor James Russell Soley. Unfortunately, his lectures were not preserved. Commencing in 1894 the international law lectures were compiled, and in 1901 the first volume of the "Blue Book" series was published. The early volumes, prepared by Professor George Grafton Wilson, the visiting lecturer in international law, included compilations of the lectures and problem cases given to the students as well as the texts of documents of special interest in international law. Since 1953, when the Charles H. Stockton Chair of International Law was established, the volumes consist of scholarly treatises in international law prepared by the Chairholders. A unique contribution of the Naval War College to the study of international law, our "Blue Books" enjoy an enviable reputation.

The importance of international law in the world community is ever increasing. There is presently a high degree of international interest in the formulation of a legal regime for the exploration of the deep oceans and exploitation of the riches of the sea. The prospect of extracting minerals and harvesting living resources from the sea captivates the imagination. Although commercial exploitation of deep ocean resources is not yet a reality, defense considerations associated with ocean activity must receive attention. From the Navy's point of view, claims to the seabed should be limited to exploration and exploitation. Vital defense interests could be endangered by permitting greater jurisdiction over the sea bottom. If the Navy is to perform its mission, unhindered use of the seas and the airspace above is a necessity. It is to be expected that not all will share our concern for the importance of free use of the seas. Thus, we must be prepared to present our case with precision and authority. This is the challenge we face.

R. G. COLBERT
Vice Admiral, U.S. Navy
President, Naval War College

INTERNATIONAL LAW AND THE USE OF FORCE

A lecture
delivered at the Naval War College
on 4 October 1968
by
Dr. Shabtai Rosenne

If international law is conceived as a standard-setting regulatory pattern for the normal conduct of states towards one another, the question of international law and the use of force--of the relationship between law in force--belongs not to its static parts, but rather to a more dynamic and, truth to tell, less clearly regulated area. Here the essential problem is to balance the dictates of a civilizing, outward-looking, standard-setting agency with the overriding introspective requirements of national security and self-defense. That is the real problem which force and the threat or use of force pose for international law. It is, moreover, the intractable nature of that conflict which leads many to the mistaken view that when reduced to fundamentals, international law is either unimportant or, at best, belongs to the category of moral standards and not those of law in the sense of imperatives. This dilemma is similar to that referred to in a recent article in the *New Yorker* (7 September 1968) on the trial of Dr. Spock where the following sentence appears: "The case was simply too palpably entwined with controversial political issues--with the ques-

tion of dove versus hawk--for its legal form and its social content to be separable." That sentence also utters the words of caution against the banality which is all too frequent in legal and political science literature dealing with the vexed problem of force. For it can be taken for granted that no responsible government will lightly decide on the employment of armed force, and it is the height of irresponsibility to approach the legal system with platitudes on the evils of force. Moreover, the dilemma of the hawk versus the dove is not confined to any one country or to any one period of time. Insofar as international law gives expression to certain social experiences and, in the view of many, to certain essential requirements of the civilized world, it, too, has to face this dilemma.

In the history of international law several phases can be observed in its approach to the problem of force. Certain aspects which are taken for granted today were not always so, just as today we face new problems for which there is little historic experience to guide us. But running through all this history is the persistent attempt to balance the legitimate requirements of national defense and security and the equally legitimate requirements of the civilized world which regards the indiscriminate use of force with distaste and seeks to place it beyond the pale not merely of the law, but of normal international relations.

The first stage in tempering the rigors of the use of force and subjecting it to legal restraint goes back to quite an early period of civilization. This relates to the protection of the noncombatant, whether civilian or the sick and wounded military. Traces of this type of humanitarian legal regulation can be found in the Bible, in the teachings of the church fathers and in comparable works of other civilizations. They find formal expression today in the Geneva Conventions of 1949. Although this humanitarian aspect is peripheral to the central problem, the history of this humanitarian law is interesting because it can illustrate the central problem of our theme. That branch of the law has as its assumption that it is possible to make a clear and a logical distinction between the combatant and the noncombatant. But the experiences of modern total wars--whether they are World Wars or whether they are localized wars--cast serious doubts on the validity of the assumption. If that is so, as regards what is no more than a segment of the problem, it follows that the central problem itself is also colored by the same characteristic. For many smaller peoples, loss of a war may mean the loss of national independence, or at least a fundamental change of the national destiny into new directions imposed by the victors. It is the natural unwillingness of peoples to submit forcibly to such changes which makes the problem of the legal regulation of the use of force one of such delicacy and difficulty, and which makes it, in the words of the *New Yorker* so "impossible for its legal form and its social content to be separable."

It may be an oversimplification to state that the topic belongs to the dynamic area of international law. It concerns the dynamics of human intercourse and of international relations in general. It is relatively easy to draw up a legal text such as the Charter of the United Nations and refer to respect for the territorial integrity or political independence of any state. The assumption of these texts is that the very conceptions of "territorial integrity" and "political independence" when applied to concrete situations are inherently static and immutable. It may be true that, in general, law is by nature inclined towards the maintenance of stability. But the relationships with which we are dealing are themselves not static, and the consecration of stability in the words of a text may end up by being

mere platitudes. A complicated variety of factors converges to make changes, and particularly territorial changes, almost inevitable. Many of the situations of conflict existing in the world today can be traced to causes of this kind, just as in other parts of the world situations of tranquillity or relative tranquillity are explained precisely by the absence of these factors for rapid and forceful change.

Does this mean that no reconciliation at all is possible between law and force? It is doubtful if a negative answer is justified. The experience of the present century seems to be showing the way in which a reconciliation could be achieved.

Intellectual and informed pacifism, as opposed to purely emotional, ideological, and dogmatic pacifist movements, has in the last hundred years looked in two directions as it approaches towards the creation of an international order which, when it is constructed, will contain built-in elements enabling it to cope with the inherent dynamism of international relations. The first is the search after acceptable international machineries for facilitating the necessary changes in the international status quo, the so-called problem of "peaceful change." The second is the attempt to regulate the use of force itself by a mixture of political machinery and legal controls.

If each of these approaches must be treated separately as a matter of systematic presentation, in fact as well as in intellectual conception, they are inseparable. Indeed, in their modern guise the two approaches grew out of a single intellectual endeavor, being the reaction of a small group of farsighted men--lawyers, statesmen, and officers of the armed forces--who were able to observe in the year 1870 on the one hand the two major continental European powers tearing themselves to pieces in a short but devastating war, and the two leading English-speaking powers, themselves on the verge of war, pulling back at the last moment and settling their differences by arbitration. The Franco-Prussian War and the *Alabama* arbitration took place almost simultaneously.

The approach to the regulation of peaceful change started with the idea that apart from the secondary, and, in a way, technical aspects of improving the actual formulation of international law (a process which, by the way, has produced very significant results during the last 20 years in the specialized area of codification of international law with, indeed, a highly sophisticated mechanism for this process), new internationalized institutions to substitute themselves for the individual wills of the sovereigns in dealing with this type of situation must be established and made operational. Apparently on the basis of what was thought to be the lesson of the organic social development which led to the creation of the modern state as we now know it, what was looked for was a way to centralize the control of force in the international area, much in the same way that inside each state private force is not allowed, and all controlled force is theoretically dependent upon the government. This was paralleled with the creation of new or improved international machineries for peaceful change and dispute settlement. These machineries fall into two general patterns: namely, those whose functions are essentially limited to factfinding (the theory being that in many cases the impartial establishment of controverted facts may itself lead to the settlement of disputes), and those aiming at the creation of more far-reaching regulatory mechanisms involving particularly machineries for conciliation and mediation and machineries for arbitration and even international judicial settlement--corresponding to some extent in practice, though not necessarily in theory, to the political role performed by the national legislature inside the states. Regardless of technical and character-

istic differences between these different institutions, their underlying approach is the same: namely, that the parties in dispute should have to lay their cards on the table, clarify their objectives, and leave it to third parties to find the reconciliation, whether by mere persuasion or by more compulsive means.

Experience has shown that in producing these machineries, for which some of the forms of internal state organization were taken, their essential substance could not easily be transferred into the international area, mainly because of the tremendous impact of national sovereignty and the concept of the sovereign equality of states. In all modern states the central authority has at its disposal force which can be used, and is used, both to prevent breaches of the law and to enforce decisions of the dispute-settlement organs inside the state. This is the manifestation, on the internal plane, of the concept of "sovereignty," and this has its international parallels too. In normal cases this works without much difficulty. The police in a criminal case and the bailiffs or the sheriffs in a civil case exist to ensure that the adjudged person carried out what he is supposed to do. Yet, in complicated situations with deep political and social overtones this system does not work so well. This can be illustrated by reference to two areas of social conflict frequently involving the use of force, with which the modern state system is showing itself increasingly unable to cope on the basis of traditional patterns. The first is the area of labor relations, and the other is the area of race relations. In both of these areas of conflict--as well as in others--legal and traditional governmental processes, while they may have immediate efficacy, rarely are able to get to grips with the root causes of the tensions and by their failure to do this produce a kind of chain reaction in the form of contempt and frustration towards the law enforcement and even the lawmaking processes, if not towards society itself.

These two particular areas of social tensions are close to the type of international tensions which endanger peace; and if the relatively closely integrated national societies are engaged in deep heart searching to find appropriate ways of handling these tensions and removing their explosive potentialities, how much greater are the differences in the uncohesive international community.

The second approach has turned more directly to the problem of force itself. It was at one time thought, for instance, that disarmament by itself would go a long way towards providing an answer to the problem, but disarmament was not effective between the two World Wars, possibly because it took the symptom for the cause, and the international debate on disarmament did not touch the roots of the suspicions and fears which have made the massive armament of nations so commonplace today.

At the same time the international community has been groping towards a form of organization which will supply political machineries to deal with the situations of tension and maintain international peace. This international effort today is epitomized by the United Nations. This is, in its external trappings, a highly sophisticated international administrative machinery, but in substance it is not very different from the more discreet system of preserving international peace of the Concert of Europe. The underlying theory in each case--and herein lies one explanation for the so-called right of veto in the Security Council today--is that the big powers, in fact and not merely in theory, bear the primary responsibility for the maintenance of international peace. This theory worked well enough so long as the big powers were able to regulate their own relations between themselves. If it has not been effective since 1918, this is mainly because they have not been successful in regulating to

the fullest extent their own relations.

In the growth of this system the formal texts are now based on the proposition that war, as a matter of national policy, is renounced. In whatever form the proposition is to be framed, whether as in the Briand-Kellogg Pact of 1928, which now exists in revised language in article 2, paragraph 4 of the U.N. Charter, or in the form of the so-called Stimson Doctrine of nonrecognition of territorial changes brought about by the illegal use of force, or in the so-called Litvinov formula of nonaggression, the proposition is one which will hardly stand up to critical analysis; furthermore, the superficial attraction of the slogan-like language blinds the unwary to the unreality of the proposition. It depends far too much on interpretation which, except when you have agreed interpretation, is at best a highly controversial exercise and at worst no more than a decoy for a naked political power struggle.

Texts of this kind--perhaps stating the obvious--explicitly reserve what the United Nations Charter calls the inherent right of self-defense against armed attack. The formulas used vary, but their purpose remains the same. The idea is that in principle the aggressive use of force is renounced as an instrument of national policy, but that if, in spite of this ban, another state employs force, its victim is legally entitled to defend itself until the organized international society takes appropriate measures to put a stop to the violations of peace.

In the Charter this system is based on three assumptions, namely: (a) that the Security Council--the organ on which is conferred primary responsibility for the maintenance of international peace and security--would have at its disposal nonmilitary and military machineries of compulsion which it could use against recalcitrant states; (b) that the Security Council would have a sufficiently united sense of purpose in the discharge of its primary responsibility, that it would be prepared to use these machineries through the devices of nonmilitary or military sanctions when faced with threatened or actual breaches of international peace and security; and (c) that the Security Council would be objectively capable of determining when an unlawful breach of the peace has occurred. Side by side with the Security Council there exists an all but defunct Military Staff Committee (which, in fact, has never met except on formal or social occasions) whose function, according to article 47 of the Charter, is to advise and assist the Security Council on all questions relating to the Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament. That is the teeth of the theoretical system of collective security established at San Francisco in 1945 with its groping attempt at the centralization of force on the international level. The U.N. Charter, taken simply as a text, appears to be a stronger document than the League Covenant, professing to learn from the failure of collective security as conceived in the interwar period by combining political procedures for peaceful change with military procedures for the maintenance of peace.

Taking the Charter as a legal text, attention may be called to two major and interconnected problems of interpretation for which the solution is still elusive. The two notions requiring definition and interpretation are the central ones of "aggression" and of "force."

The main problem of the definition of force is whether it should be limited to armed force (which, of course, is fairly easily identifiable), or whether, for the purposes of constructing an adequate modern international order, the concept is now a broader one altogether, including such intangible ele-

ments as psychological, economic and political pressures. If there is a strong reaction today, and rightly so, against the "gunboat diplomacy" of the 19th century, there is an equally strong reaction against its so-called "gin-bottle diplomacy"; for the great colonial empires now disintegrating are said to have been established by a sinful combination of these two methods of coercion. Most of the countries of the world are militarily and economically weak, and if the matter is approached simply as one of head-counting in international conferences, in which all states participate on a footing of formal equality, there is little doubt that the majority, indeed the overwhelming majority, with memories of Munich (1938) very much in their mind would prefer the broadest possible interpretation as including all forms of pressure which one state can bring upon another. In practical terms this is obviously quite unreal; just as in ordinary human relations pressures can be used quite legitimately, until the fine dividing line of the illegal area of undue pressure is reached.

The question of the definition of aggression has been under international discussion since the late 1920's, although it is actually older and is connected with treaties of guarantee and of nonaggression. In terms of the discipline of the law, the necessity for a definition of this term is now said by its proponents to arise from the obligation of members of the League of Nations, or today of the United Nations, to come to the assistance of the victim of aggression within the framework of the concept of collective security. It has been said, for instance, that a definition of aggression would assist the Security Council in its work, though this suggestion is undoubtedly tendentious.

There is no difficulty over the obvious and blatant cases of direct aggression, which can easily be observed and listed. The difficulty arises over the far more dangerous and insidious forms of indirect aggression deliberately carried out in a way which enables a government to deny responsibility for them. Techniques of this kind were commonly used in Europe as tensions preceding World War II were building up, and they have continued to be used ever since. Words like "Auslandsdeutsche" in the Nazi period, "Volunteers" in the Korean war, or "Fedayeen" or "El Fatah" in the Middle East illustrate this. These phenomena also illustrate in practical terms the problem of the so-called preventive war and the risks to international peace and security which are created, if one thinks of defining aggression in exclusively enumerative terms. Such a definition of aggression is appropriate, perhaps, for the identifiable instances of direct aggression but quite inappropriate if one takes a broader look at the whole problem of the international regulation of the use of force.

On the whole, the Security Council as an organ operating collectively and the powers represented on it working individually have displayed a marked reticence towards formally condemning a state as an aggressor, even in quite obvious cases, except where, for some fortuitous circumstance, the parliamentary situation was favorable to one point of view as in the case of Korea in June 1950, and even then the North Korean action was called only a "breach of the peace." There are at least two explanations for this. One is the deep political cleavage existing among the permanent members of the Security Council which is responsible for the noncreation of international peacekeeping forces at the disposal of the Security Council such as are envisioned in the U.N. Charter, and in general for the Council to act as planned in the Charter. In the major conflicts which have come before the United Nations since 1945, the divisions between the major powers, deriving from the deep clash of interests in terms of global strategies, have pre-

vented them ever being at one and saying that an act of aggression has taken place, or that joint and universal action was needed to restore the peace. The second is a matter of diplomatic technique. If the objective is the restoration of peace and the adjustment of a situation that has given rise to serious tension, pejorative assertions that one side or another had been guilty of aggression are not likely to be helpful in terms of reaching a settlement. Instead of this we find the Security Council adopting a more pragmatic approach and concerning itself rather with preventing the spread of violence and bringing it to an end than with condemning states. This has been coupled with the virtual abandonment by the Security Council of any idea that it could legislate a new situation into existence. This has been left to the parties, the international organizations at best providing a set of recommended guidelines. In the same line of thought, internationally controlled and internationally composed military forces have been created ad hoc and have operated under the United Nations flag, working not under the compulsory powers of the Security Council but by agreement of the states concerned, something which the U.N. Charter did not foresee. Many think that in the long run this is a more satisfactory approach towards intractable problems, and one closer to international realities, than any attempt to operate the Security Council as though it were a kind of world policeman intervening automatically to prevent real or threatened breaches of the peace and a world legislature dictating settlements.

One of the common techniques to cover up the use of force in foreign relations is that of intervention at the invitation of the responsible authorities of an invaded state. Armed intervention is nothing new in international relations, it being the traditional manner in which strong states imposed their will on weaker states or prevented the emergence in weaker states of elements hostile to their own policies. Today, under the regime of the U.N. Charter, intervention of this type is banned. It is in order to overcome that ban that the procedure has been evolved by which a government "invites" some outside power to send in its armed forces to "protect" it. Sometimes this happens when internal turmoil may threaten the internal regime without necessarily leading to a change in the general international orientation of a state; at others, the internal turmoil may even be produced or accompanied by external elements themselves aiming at producing a change in the country's external orientation. In the first type of case, where the international status quo is not really threatened, this form of intervention, while not commendable, may not always be open to serious reproach, provided the invitation to intervene is real, that it leaves the government in command of the situation and is not excessive, and that it is terminated as soon as feasible. The other type of case, on the other hand, will have serious international repercussions, possibly of the most far-reaching kind. Nevertheless, the fact that the intervention is in response to an apparently authorized invitation from some responsible authority may be of purely nominal significance.

The reader may detect in this article a tone of pessimism, as though the lawyer and diplomat are resigning from their professions in face of the enormous problems confronting them. But such a conclusion would be premature. There is no doubt that the international society, with all its deep-rooted schisms and heterogeneity, has advanced a long way in strengthening the peace-preserving mechanisms in comparison with what was the position as little as half a century ago. Perhaps the greatest advance has been in the realization that an adequate legal order can only be con-

structed on the basis of a realistic approach which fully recognizes on the one hand that no self-respecting nation will jeopardize its supreme national interests, as it conceives them, on the altar of legalism or idealistic perfectionism, and on the other that there do exist collective interests beside the egoistical interests of the individual states. This is undoubtedly balanced by the fact that thanks to the destructive force of modern weapons and the totality of modern war the subjective weighing of the national interest is a far more delicate and profound operation than it appears to have been even as late as 1939. To overcome the present suspicions and fears is a major political task which the lawyer is perhaps not the best equipped to perform. Indeed, one might easily say that just as war is too serious a matter to be left to the generals, so is the international legal regulation of force and its various manifestations too serious a matter to be left to the lawyers and politicians. The U.N. Charter attempted, on the basis of its pragmatic approach to the matter, to combine the political, economic, legal, and military aspects under the aegis of the Security Council. For political reasons the original scheme has failed, and its replacement has not yet begun to take clear shape. But that it can only be based on that kind of combination of professional talents and interests is now widely recognized. When that ideal situation will have been reached, the world will be in a better position to provide effective international machinery for making objective determinations of whether the supreme national interests are at stake. So long as that determination is left to the individual subjective appreciation of each state, as it now inevitably is, the matter is going to be left to political judgment with the law following suit.

In the development of the concept of collective security, with its concomitant of sanctions against the state guilty of the breach of the peace, the naval arm of the armed forces occupies a prominent place. For many centuries the naval forces have formed the main instrument by which force has been brought to bear (except as far as concerns the immediate limitrophe states). Furthermore, as a syllabus in the Naval War College puts it, naval force provides the dynamics for "bilateral as well as multilateral and often abrasive confrontations between discreet sources of power and military force." It is frequently overlooked today that many of the details of the concept of sanctions as they exist in books about the League

BIOGRAPHIC SUMMARY

Dr. Shabtai Rosenne, a noted scholar and practitioner in the field of international law, is presently the Ambassador and Deputy Permanent Representative of Israel to the United Nations. He holds the degrees of LL.B. (University of London) and Ph.D. (Hebrew University of Jerusalem). He served as Advocate in the Political Department, Jewish Agency for Palestine (1946-48), and Legal Advisor, Israel Ministry for Foreign Affairs (1948-1967) and has been a member of the Israel Delegations to 12 Sessions of the United Nations General Assembly.

Dr. Rosenne has acted in various capacities in the Israel delegations to the United Nations Conference on the Law of the Sea (1958, 1960), and on the Law of Treaties (1968), and is a member of the International Law Commission.

He is an Associate of the Institute of International Law and Rapporteur on the question of Termination and Modification of Treaties.

His awards include the Israel Prize (1960) and the Certificate of Merit of the American Society of International Law (1968).

Dr. Rosenne has participated in proceedings before the International Court of Justice. He has written numerous articles on international law matters, and his books include *The International Court of Justice* (1957) and *The Law and Practice of International Court* (1965).

of Nations and in certain official papers of the United Nations have their direct inspiration from the economic warfare measures applied by the Allied and Associated Powers during each of the two World Wars, in which the naval forces played a key role. The old system of prize law, now largely relegated to the limbo of naval and legal history (where it makes fascinating reading), provides the inspiration for much of the contemporary conceptions of collective applications of sanctions, and even of individualized applications of force, in exceptional circumstances. The quarantine of Cuba has its historic parallels in the Anglo-French economic warfare in the Napoleonic wars, in the long-distance blockade of the American Civil War (the *Alabama* arbitration previously mentioned was an outgrowth of that), and in the elaborate controls of all seaborne trade initiated by the Allies in 1914 and perfected in 1940, and in post-1945 controls of the movement of strategic materials from one part of the world to another.

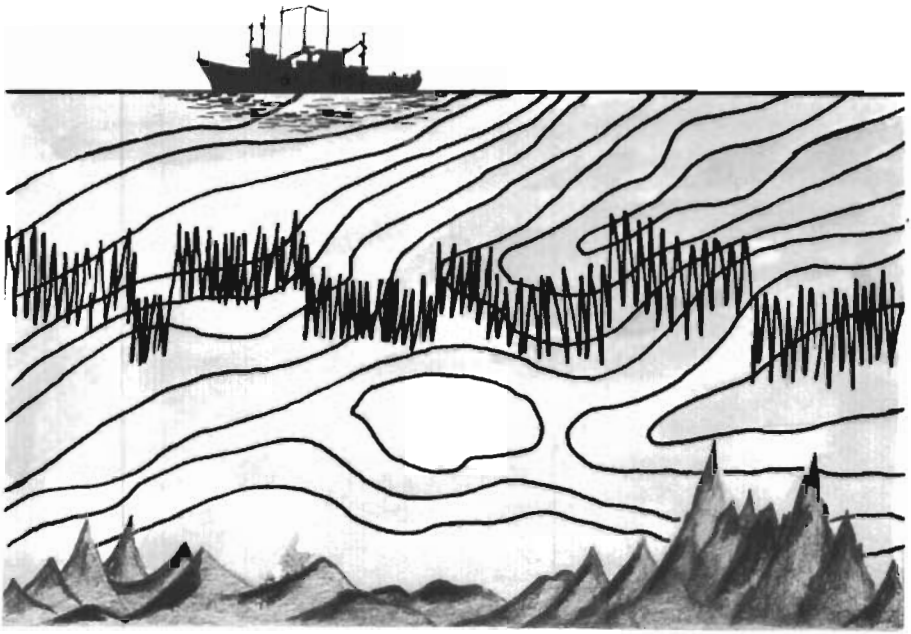
It is stated in the Naval War College syllabus that the naval officer must be in a position with sureness and firmness to understand, evaluate, and effectively exploit the legal advice and counsel which he solicits. The naval officer is not, of course, the only public servant to which that admonition should apply (it should certainly apply to the diplomat). If this article has conveyed the impression that there is little firm in the legal rules governing the employment of force, one may at the same time safely assume that a responsible government--and one cannot legislate for irresponsible governments--will determine the limits of the freedom of action of a commander in any military or quasi-military action, and that adroit use of modern communications in unforeseen situations, in the context of the general humanizing mission of the contemporary international law, will provide a fair course on which to sail. For in the final result, international law, like all law, is common sense writ large, and common sense coupled with good faith goes a long way towards remedying formal deficiencies which the unsatisfactory state of contemporary law exhibits.

Ψ

It is no doubt a good thing to conquer on the field of battle, but it needs greater wisdom and greater skill to make use of victory.

Polybius: Historiex, x, c. 125 B.C.

NEW ISSUES AND NEW INTEREST IN THE LAW OF THE SEA



A lecture delivered at the Naval War College
on 14 October 1968
by
Rear Admiral Joseph B. McDevitt, JAGC, U.S. Navy
Judge Advocate General of the Navy

The past 2 years have witnessed an intense national and international debate over major issues in the law of the sea. The legal questions connected with man's increasing desire to exploit the living and mineral resources of the seas and ocean floor have occasioned particular interest both domestically and abroad.

At home several bodies, which I will mention later, have devoted their activities to these questions. Internationally, the increased activities of the Intergovernmental Oceanographic Commission (IOC) and Intergovernmental Maritime Consultative Organization (IMCO) have been supplemented by debates at the 22nd Session of the General Assembly which resulted in a new 35-nation U.N. Ad Hoc Committee on the Seabeds. The United Nations General Assembly will again address these problems this fall. Indeed, each week brings a report of new scientific or commercial interest in the resources of the sea and ocean floor. The imagina-

tion of Jules Verne 100 years ago in *Twenty Thousand Leagues Under the Sea* is finally being outstripped by actual technology. The future is projected in the context of scientific research and technology infinitely more exciting than the literary entertainment of science fiction. Using the commonly accepted U.S. measure of importance--the almighty dollar--it is reported that current economic activity in just that portion of the sea area known as the Continental Shelf is in the magnitude of multi-billions of dollars.

The dramatic increase in the national and international efforts being made in this area directly reflects the increased attention being focused on the Continental Shelf and deep ocean floor by previously disinterested nations. This increased interest and involvement carries important implications for many of the Navy's ocean-based activities.

If the deliberations on near shore and deep ocean seabed problems could be described in a single word, that word would be diversity; diversity of desires, of technological capabilities, and of expectations. In addition to navigational and related uses, the ocean waters and the bed of the sea are now commercially producing oil and gas, salt, bromine, magnesium, sulphur, and other minerals, not to mention the vast variety of products of the fishing industry. It is not surprising that legal principles proposed for this new frontier are as numerous and divergent as its material potential.

There are numerous national positions as to the importance and priority to be attached to the establishment of legal principles in the ocean environment. Thus, it has unquestionably become an arena in which private and governmental interest is generating pressure for development and legal change.

Domestically such pressures resulted in passage of the Marine Resources and Engineering Development Act in 1966. This act established a Cabinet-level National Council on Marine Resources and Engineering Development and a Commission on Marine Science, Engineering and Resources. The Navy, from the Secretarial level down, has played a major role in the deliberations of the Council, Commission, and the many subordinate interagency working bodies established under them. The Office of the Judge Advocate General has been consulted more and more frequently as the legal facets of technological and scientific problems became apparent.

While the National Council and the Commission have focused primarily on the long-range needs of a national oceanographic program, there has been a dramatic increase in the tempo of ocean-oriented activities at all levels of the U.S. Government. New international involvement in the area of oceanography is well illustrated by the resolution introduced by Malta at the United Nations in the summer of 1967. This resolution proposed restricting use of the seabed to peaceful purposes and establishment of a legal regime which would insure that the proceeds of deep ocean mineral wealth would be used to aid developing countries.

This and other proposals pointed up the need in the U.S. Government for a high-level permanent interagency committee which could focus on the day-to-day problems of preparing and presenting U.S. positions in relation to the Continental Shelf and deep ocean floors in various international forums. This need was met this past February by the creation of the Interagency Committee on International Policy in the Marine Environment under the chairmanship of the Deputy Under Secretary of State. The Assistant Secretary of the Navy (Research and Development) is the Department of Defense representative on this committee.

The Continental Shelf and deep ocean floor questions required immediate attention by the new Interagency Committee both because of the

ongoing meetings of the United Nations Committee on the Seabeds, which was established following the Malta resolution, and because numerous private groups and Government agencies were urgently seeking clarification of the jurisdictional limits of the U.S. Continental Shelf. Accordingly, a Working Group on the Shelf and Deep Ocean Floor, abbreviated as SADOF, was established. I have been privileged to be appointed the Department of Defense representative on this working group.

The active role played by the Department of Defense, and particularly the Navy, in the long-range studies and policy planning work of the National Council, the Commission, and the Interagency Committee is surprising and disturbing to some. This reaction is based on the fact that most of the broad range of oceanographic problems concerns civil or peaceful uses of the oceanic environment, with particular emphasis on the extraction of its mineral and living resources. There are, however, several good reasons for the interest and concern of the Department of Defense and, in particular, the Navy.

First, the Navy manages numerous programs which have potential civilian as well as military applications. Its well-known Man-in-the-Sea program alone is developing numerous new techniques useful in many phases of the offshore oil industry. In fact, the Navy spends approximately half of all governmental monies available within the United States for scientific research and technology development which have oceanic applications.

Second, it is reasonable to assume that the military will play an important role in affording protection to U.S. citizens and to their personal property that may be placed on the seabed of the Continental Shelf, or beyond, to be used in scientific or extractive operations. It is important, therefore, for the Department of Defense to understand the needs and rights of such operators so that the protection afforded will be both reasonable and lawful and thus minimize the risk of conflict.

The third reason for our interest is that it is important that modes of accommodation be developed to insure that military activities do not unreasonably interfere with new usages or impede future progress made possible through new technology. Already, new means of coordinating oil drilling operations and Navy weapons testing along the California coast have been found.

The fourth and most compelling reason for the Navy's direct interest and concern with these developments is that implementation of many proposals would create an implicit acceptance of additional constraints and controls on military activities. Proposals which would, on the one hand, increase national jurisdiction over coastal waters, in a qualitative or quantitative sense, or, on the other hand, place the seabed of the deep oceans under the control of an international agency could have a significant impact on the historic principle of freedom of the seas. It is of particular importance to avoid arrangements which would result in the degradation of the right of warships and submarines to navigate on and under the high seas. Any arrangements--if they are to be reflective of our overall national interests--must recognize that the oceans are, and will continue to be, vital to our national security.

Thus, Navy participation in our national deliberations has been considered both necessary and desirable to ensure that national security interests are fully considered in the course of developing both long-range criteria and immediate policy initiatives.

During the past year it has become increasingly clear that fundamental issues of international law of the sea are intertwined with and underlie the development of a comprehensive oceanographic program. Virtually all arrangements being discussed either rely on or

modify historic principles of international law. Accordingly, the lawyers within the various agencies have played an increasingly active role in the consideration of these issues.

The most immediate area of interest to international lawyers is the Continental Shelf. This area, in geological terms, is the extension of the continental mass which gently slopes out from the world's coasts. It extends in some places further than 200 miles before a sudden break in grade, normally located at about the 200-meter depth curve, plunges into the deep ocean abyss. The Continental Shelf is most easily accessible to man's developing marine technology; and lawyers are now compelled to consider its legal status by the burgeoning commercial and scientific activity made possible by its relatively shallow superjacent waters.

The Shelf and Deep Ocean Floor Working Group referred to previously which, by the way, is composed primarily of lawyers, is presently engaged in developing recommendations on two fundamental questions of mixed policy and law. One is the question of how and where the outer limit of the regime of the Continental Shelf should be further delineated. The second is what type of legal regime should be negotiated regarding the ocean seabed and its resources beyond the outer limit of the Continental Shelf.

President Truman initiated the Continental Shelf regime in 1945 when he unilaterally proclaimed that the United States would exercise exclusive jurisidiction and control over the natural resources of the seabed and subsoil of our adjacent Continental Shelf. In a press release which accompanied the Truman Proclamation, the area was described as including all of the ocean floor "contiguous to" the coasts of the United States to a depth of 600 feet--which is approximately 200 meters.

A mere 13 years later the Continental Shelf regime was codified by the 1958 Geneva Convention on the Continental Shelf. The Convention, however, describes the outer boundary of the regime in somewhat less than precise terms.

Article 1 provides that the term "Continental Shelf" refers to the seabed and subsoil of the submarine areas adjacent to the coasts but outside the area of the territorial sea to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas. Thus the Continental Shelf regime becomes applicable beyond the 200 meter isobath as new technology such as new types of Texas Towers or even completely submerged installations allows commercial extraction of oil and gas resources at greater depths. This, of course, is an open ended definition--depth of 200 meters or depth of exploitability.

The exploitability test does not meet the normal legal requirements of certainty. However, it does have the advantage of flexibility and makes the Convention applicable without change to future situations brought about by new technology. Of course, this second criterion tends to make the scope of the Convention ambiguous and has already created heated discussions and divergent views among international lawyers.

As the U.S. Department of Interior has already leased areas beyond the 200 meter isobath, the question of the permissible scope of the exploitability test is no longer academic. Considering the emerging technological capabilities possessed by the United States and other leading maritime powers and the fact that the Convention by its own terms is open for amendment in 1969, the Department of Defense has agreed that the question should be examined as to how the rather vague exploitability criterion should be modified. Accordingly, the United States tabled several months ago a proposal before the

United Nations Committee on the Seabeds that there should be established as soon as practicable an internationally agreed, precise boundary between the deep ocean floor and the regime of the Continental Shelf. This, then, is the basis for urgency behind the first of the specific tasks assigned to the Working Group on the Shelf and Deep Ocean Floor--to develop a recommended U.S. position on the question of how the Continental Shelf outer boundary should be established and where it should be.

At least four "legal" issues are basic to an evaluation of the relative desirability of various proposed outer boundaries, and the working group deliberations have revolved around these issues to date.

The first is an examination of the qualitative nature of the present Continental Shelf regime. That is, what rights and duties does the Convention on the Continental Shelf impose upon a nation possessing a Continental Shelf, and do these rights and duties apply to nonsignatory nations? Numerous questions remain under the Convention regarding types of allowable scientific research activities and other matters. The desirability of an outer boundary formula which produces a broad Continental Shelf depends, for a maritime nation with worldwide interests such as the United States, in large part upon the types of activities on and over the shelf regime which can be regulated and how they can be regulated. In this regard the relevancy of applicable domestic legislation must also be determined.

Closely related to this question is the effect which the location of a boundary will have on traditional freedoms of the sea exercised either within the waters over the shelf or outside the new boundary. What types of new limitations on transits by surface vessels will develop, for example? The establishment of a precise boundary in and of itself might stimulate nations to increase the degree of control they exercise over events landward of that boundary, but it might also tend to insure that events seaward of the boundary were protected from at least some types of claims to national jurisdiction.

Thirdly, what impact will the boundary have on the difficulties or chances of effectuating a satisfactory regime for the exploitation of the resources beyond the boundary? If the boundary is far seaward, for example, there are few known resources whose exploitation would be affected by a deep ocean regime in the near future.

Finally, by what methods or procedures may the boundary be changed? Is it possible, in other words, to establish a precise boundary through interpretation of the Shelf Convention, or is further legislation or a new treaty necessary to alter the status quo? In this regard it should be noted that though there is little specific reference to how far and how deep the shelf regime could extend under the exploitability criterion in the 1958 Convention working documents and debates, it would seem that the exploitability test of the Convention is, in fact, limited by the requirement of reasonable proximity to the coast and reasonable relationship to the geologic Continental Shelf.

The question as to what the most desirable limit should be--from the standpoint of national security--is a complex one. The qualitative nature of lawful restrictions upon military activities sought to be undertaken on a foreign Continental Shelf are not yet clearly defined. It is clear, however, that military activities may not be undertaken on or above a foreign shelf which would interfere with that nation's right to explore its shelf or exploit its resources.

The Navy is presently examining the military implications of various proposals for specific outer limits. These proposals range from 200 meters to 4,000 meters in depth and from 50

miles to 200 miles from shore or a combination of both depth and distance criteria. Without attempting to prejudge the conclusion of these Navy studies and the work of SADOF, the general conclusion appears warranted that a relatively narrow Continental Shelf regime would best serve the security interests of the United States. The conclusion that our military interests are best served by a restrictive definition is to a considerable extent, however, based upon the nature of an agreed deep ocean regime that will evolve beyond the Continental Shelf.

Our SADOF Working Group has also been tasked to develop recommendations regarding a regime for the deep oceans beyond the Continental Shelf. In this connection the United States recently tabled at the U.N. Committee on the Seabeds certain basic principles to be used as a basis for internationally agreed arrangements for the exploitation and use by states of the deep ocean floor and its subsoil. The fundamental principle proposed was that no state may claim or exercise sovereign rights over any part of the deep ocean floor.

This is not to say that the exploration and use of the deep ocean floor or the exploitation of its resources are prohibited. The deep ocean floor may be used for nonmilitary or military activities under existing principles of international law pursuant to the concept of the freedom of the seas--recognizing, of course, that reasonable regard must be given to the interest of other states in their exercise of high seas freedoms. In addition, there is agreement among most international lawyers that minerals lying beyond the regime of the Continental Shelf may be lawfully exploited, and the exploiter is entitled to keep what he finds.

A question does exist, however, as to whether an individual or nation may claim some form of interest in areas adjacent to an exploitative activity and, if so, how large such areas can be. In this regard it is reasonable to conclude that in the not too distant future, clarification of such rights will be necessary in order to render deep ocean exploitative operations both feasible and profitable.

The development of a specialized system for the exploitation of resources varying from the high seas rights mentioned a moment ago is predicated on the assumption that a regime that vests an exclusive right to the resources only after they are extracted is not reflective of the economic needs of the exploiter of mineral resources. Quite frankly, it is also predicated on the assumption that a system should be devised which will permit all nations to share in the ocean's wealth--either directly or indirectly.

There are at present many possible regimes under consideration. They generally fall into the following categories:

First, the *Flag state proposal:* Under this system the nation would assume responsibility over an exploitative operation as if it were conducted on a vessel of its registry. The state of the exploiter would have a protective interest in the resource to be exploited within a reasonable area.

Secondly, an *International registry:* Under the system an international

BIOGRAPHIC SUMMARY

Rear Adm. Joseph B. McDevitt, JAGC, U.S. Navy holds both a bachelor of arts and a bachelor of laws degree from the University of Illinois and is a graduate of the Naval War College, School of Naval Warfare, Class of 1958. His legal duties are varied and extensive and include: duties with the Joint Staff of the Joint Chiefs of Staff; Director, International Law Division of the Judge Advocate General's Office; and Legal Affairs Officer for the Commander in Chief, Pacific. Rear Admiral McDevitt is currently the Judge Advocate General of the U.S. Navy.

agency would register a national claim with some authority regarding competing claims, thus validating the state's claim.

Thirdly, complete *Internationalization:* Under this system an international agency would "own" the resources of the seabed of the deep oceans. In effect, permission from the agency would be necessary before any exploitation took place.

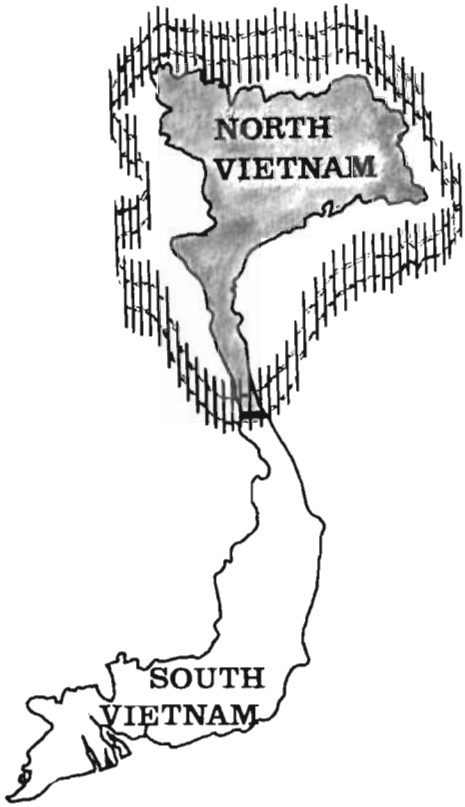
A combination of these alternatives is also possible. For example, some form of international registry of claims in conjunction with a system of flag state jurisdiction and control deserves serious consideration. From the national security standpoint, such a system might even be advantageous for it might tend to reduce the risk of economic conflict or territorial claims and, at the same time, not materially interfere with or constrain peacetime military activities and deployments.

The final choice of the most favorable deep ocean regime alternative has not been made in SADOF or other national forums. As with the question of a precise outer boundary for the Continental Shelf, much work remains before the solution most beneficial to our composite national interest is found. In the course of this work, however, one underlying fact stands out--the oceans are becoming more, not less, essential to the security and well-being of most, if not all, of the peoples of the world. And this fact alone dictates that we should be more, not less, deliberate at arriving at irreversible decisions.

Ψ

We must make this campaign an exceedingly active one. Only thus can a weaker country cope with a stronger; it must make up in activity what it lacks in strength.

Stonewall Jackson: Letter, April 1863



BELLIGERENCY AND LIMITED WAR

A lecture delivered
at the Naval War College
on 9 October 1968

by
Captain William O. Miller, JAGC, U.S. Navy
School of Naval Warfare

When I was asked if I would give this presentation, I wondered if the title, "Belligerency and Limited War," was cast in technical legal terms--that is, does it mean belligerency in its generally accepted legal sense--and does it mean "war" in its generally accepted legal sense--or does it mean a situation where there is no technical state of war but, nevertheless, where there is a large-scale armed conflict raging.

This is an extremely important consideration, for the technical existence of a state of war, in the traditional law, has been a prerequisite for the legitimacy, in a legal sense, of certain types of actions. For example, the term "blockade" is a term unknown in the law except as it connotes a belligerent blockade in time of war.

This has always seemed to me to be a somewhat less than adequate manner of viewing the problem. The real problem, it seems to me, is the need to determine what degree of force, applied in what manner, against what targets, may states reasonably expect acceptance by the majority of other states.

But until just recently this entire problem has been approached by almost all of our international law publicists--and, indeed, by the states themselves--from the two polar extremes--there was a "law of peace" and there was a "law of war." Almost all of the major works in the international law field are divided into two parts--one on war, the other on peace.

What I think we should ask ourselves in any study of this topic is how much real utility does the dichotomy of a law of war and law of peace provide to us, and I think we will come up with the answer that in a contemporary situation it provides little utility at all.

Let's take a look just for a minute at the situation in Vietnam. War or peace? Or does it really matter from a legal standpoint?

As a factual matter, what we have there is a conflict of major proportions. But, as we are all aware, there is no technical state of war in existence. You have read the memorandum from the Defense Department to the Senate Armed Services Committee in which it was stated that the present situation imposes no obstacles on us in the pursuance of our objectives in Vietnam, and I have no doubt that this is true. But what if our objectives should broaden and it was considered necessary to restrict the inflow of goods into North Vietnam? I know you have often heard it said that we cannot blockade Haiphong because it is not legal, because blockade is legal only in time of war. I have also heard it said that the present coastal surveillance measures by the South Vietnamese cannot extend beyond 12 miles from their coast--beyond their contiguous zone--because it is illegal, except in unusual circumstances in time of peace, to exercise control over the ships of another state beyond that limit. The effect of these statements is simply that the Republic of Vietnam/United States cannot insist on belligerent rights because a state of war does not exist.

The converse may have been true in the United Arab Republic's blockade of the Israeli port of Elath. Was this "blockade" legal or illegal? It depends on what law you apply--the law of war or the law of peace. Clearly, I think that if the U.A.R. possessed belligerent rights--that is if a state of war existed between Israel and the U.A.R.--their actions were legal. It would be to the contrary, however, if they did not possess belligerent rights. The basic position of the United States on this point was that belligerent rights did not exist because of a 1953 Security Council Resolution which stated the prior armistice had ended the war and that neither side could legitimately claim belligerent rights. Hence, it was said, the 1958 Geneva Convention providing for free passage through international straits was the controlling rule. The Egyptians, on the other hand, based their position essentially on the fact that there was, indeed, a state of war existing, that it had merely been suspended for a time by the armistice, and that they considered it necessary for their security to prevent influx of strategic goods. Also, they very pointedly noted that the 1958 Geneva Conventions were intended to regulate peacetime, and not wartime, relations.

The point here is that there are such things as belligerent rights, rights which exist only in a technical state of war. Many today contend that this state of the law does not satisfactorily treat the contemporary situation where we don't really have "war" in its traditional and technical sense, and where we don't really have "peace," but where we must deal with something in between. I have also heard it said that this war/peace dichotomy does not really or effectively prescribe a norm of conduct for a state. If one's actions are illegal when placed in the "peace" cubbyhole, legality can be bestowed on them by designating the situation in which they occur as "war."

While the thrust of this statement may be true to some degree, it is, of course, by no means true that the designation of a conflict as "war" is a step to be taken merely to legalize some act; for when one party to a conflict considers whether it should insist on belligerent rights, it must also consider a host of other factors, not the least of which are the treaty relations of its opponent which the existence of a state of war may bring into play, and most important by that the exercise of belligerent rights will impose reciprocal restrictions upon neutrals, restrictions which those neutrals may be loath to accept. Hence, the importance, power, and inclinations of so-called neutral powers and the effect that belligerent restrictions on their normal rights will have are extremely important considerations.

This can be illustrated by the traditional law of war as it relates to the belligerent right to embargo sea commerce to and from its enemy--to stop the flow of goods, both inward and outward, which enhances the enemy's warmaking effort.

The particular method for accomplishing this purpose, which I want to discuss, is the traditional or the belligerent blockade.

Blockade was originally conceived and executed as the maritime counterpart of siege. It was the total prohibition of maritime communication, inward or outward, with a designated portion of the enemy's coastline. Its focus was, and is, on ships, unlike the law of contraband where the focus is on cargo. Blockade is defined as the belligerent right to prevent vessels of all states from entering or leaving specified ports or coastal areas which are under the sovereignty, occupation, or control of the enemy. This could include the whole of the enemy coastline, as indeed it did during the American Civil War when the Union forces maintained a blockade of the entire Confederate coast.

Blockade, by its nature, involves not only interference with vessels flying the enemy's flag, but also with vessels flying the flag of neutral states. One of the most fundamental considerations in blockade is that it applies to belligerent and neutral vessels alike; hence, one of the restrictions of neutrals which I mentioned a moment ago, restrictions on a state's otherwise legally unrestricted right to trade with whomsoever it wishes. Neutral states, therefore, traditionally insisted that the enforcement of a blockade must be in accordance with strict and clear rules, the first of which being that the blockade must be enforced impartially against ships of all states. If ships of some states are permitted through and those of others are not, then a blockade in its legal sense may not be said to exist. The United States used this point as basis for its strenuous objections in the British blockade of Germany in World War I which significantly interfered with U.S. trade to German ports but did not restrict Scandinavian trade to these same ports.

The blockading state must commence the blockade with notification to all nations as to when the operation is to begin and the area to be affected. In this latter regard the blockade must not be so designed as to bar access to, or departure from, neutral ports or coastlines. This was intended to ensure that the blockade does not interfere with strictly neutral trade.

Next, the blockade must be effective. That is, it must be maintained by sufficient force to make blockade running hazardous, and it must involve a high degree of risk. The blockade of the Confederate coast, which I mentioned, was contested on this ground by some neutral states whose vessels were apprehended. The blockaded coastline was about 3,000 miles in length, and there were only about 45 Union ships patrolling the area. As a consequence, many

blockade runners managed to get through. Nevertheless, the U.S. Supreme Court had little difficulty in determining that the blockade was effective, so as to make legal the condemnation in prize of the ships which were captured.

Breach of a blockade occurs when a vessel, having knowledge of the blockade, passes through or attempts to pass through it en route to or from the blockaded area.

The penalty for breach, or attempted breach, is the confiscation of both the ship and its cargo, whether contraband or not.

I emphasize here that the liability of the blockade runner is to capture, and condemnation is the prize. The blockade runner could not be destroyed unless she resisted or fled, and unless destruction was necessary.

What I have just described is the traditional, or close-in, blockade. This does not mean that the blockade force must be disposed close-in to the enemy coastline or port, but it does mean that the blockading force must be so deployed that neutral vessels bound for neutral ports will not have to pass through the blockade line, and thus subject themselves to being boarded and searched, and possibly seized for a blockade breach. This highlights one of the basic problems of the traditional blockade in modern times--the deployment of the blockading force close-in to the blockaded area may be impossible from an operational viewpoint, and geographical considerations make it impossible, in most regions, to blockade farther at sea and not interfere with innocent neutral shipping or bar access to neutral ports.

Accordingly, we have seen in modern warfare the almost total disuse of the traditional blockade. While there were some minor close-in blockades during World War I, none were of any real significance; and World War II reported only one incident of its use--the Soviet blockade of the Finnish coast in 1940.

There were, of course, blockades of a type during both World War I and World War II, but these were not blockades in the traditional sense, and they were never sought to be justified as such. They were frequently referred to as long-distance blockades since they embodied closing and patrolling large areas of the high seas, hundreds of miles from the enemy's coastline. In both wars the British blockades of Germany consisted principally of controlling the northern and southern approaches of the North Sea, thereby restricting access to some neutral ports as well as German ports. And the Germans, as you know, by the use of war zones blockaded the whole of the British Isles. Both sides employed new weapons for the enforcement of these long-distance blockades. Where in prior wars the surface man-of-war was the weapon utilized for commerce control, belligerents now supplemented the surface fleets with the submarine, the aircraft, and the mine. War zones were established by all belligerents through which passage was prohibited or restricted and made extremely dangerous by a combination of these weapons. Thus, large areas of the seas were mined by the British, Germans, and later by the United States; and neutral shipping was cautioned to stay out and were told that if they desired to pass through the area on an innocent voyage, to funnel through certain designated areas where inspection of their cargo could be facilitated.

As another method of control, the British established a system of issuing "navicerts" to neutral vessels transiting the blockaded area en route to neutral ports. Under this system a vessel, legitimately engaged in neutral trade, could obtain a navicert at its port of last loading which attested to the innocence of its cargo and destination. Upon reaching the blockaded area, the neutral vessel would be allowed to pass unhindered. Similarly, a neutral ship outbound from a neutral port from within

the blockaded area could obtain a navicert attesting to the nonenemy origin of its cargo. This system had the effect of greatly facilitating the enforcement of the British blockade and, at the same time, minimizing delays in such neutral trade as the British were willing to permit.

Let me just summarize the three principal departures from the traditional rules which characterized the blockades of both sides in both World War I and World War II:

1. Establishment of war zones in large areas of the high seas, restricting access to neutral ports and making transit through these zones dangerous by the use of mines, submarines, and aircraft: weapons systems which were unable to exercise the traditional method of blockade control--capture of the blockade runner.

2. Therefore, subjecting ships attempting to pass to destruction rather than capture and condemnation in prize, as the penalty for breach or attempted breach of the blockade; and

3. Almost total control of, instead of minimal interference with, bona fide neutral commerce.

I want to point out again that these actions were never supported, in a legal sense, under the traditional law of blockade. They were justified, rather, under the law of reprisals as actions which, although illegal, are rendered legal by virtue of a prior unlawful act of the enemy. Whatever the legal justification, the real significance of this action lies in the fact that these departures from the old rules were made not just on occasions but persistently throughout the major wars by all participants. Thus, I would say the old rules, by this course of conduct, were shown to have lost their validity as law, if we mean by law a standard of conduct to which we can expect general community adherence. Many contend, however, that these departures from the old rules must be viewed strictly in their reprisal context and that as such they merely reflect the operation of sanctions for the illegal conduct of the opposing belligerent and that hence they can obtain no color of legality except as such.

Professor Lauterpacht, however, states what I think is the better view in this manner:

> Measures regularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent, must be regarded as a development of the latent principle of blockade, namely that the belligerent who possesses effective command of the sea is entitled to deprive his opponent thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originate from him.

In other words, new conditions have demanded new laws, and they should have them. This was seen at the outset by Grand Admiral Tirpitz, who has been referred to as the father of German submarine warfare. He said this in his memoirs:

> Had we dealt with the submarine campaign coolly and consistently, we should have prepared the ground for the view that the campaign was not merely justifiable as a reprisal against the starvation blockade (which, unfortunately, was the only argument put forward on our behalf), but that it was clearly and irrefutably justified by the maritime law created by the English themselves at the beginning of the war. The new weapon could not be bound by the rules made in the old sailing days of a century ago, but had a right to a new law. Does anyone seriously believe that in any future war a people fighting for its life will not use the submarine as we have used it in this war, even if the rules of international law forbid them to do so.

The point I want to make here, and, indeed, in this entire presentation, is that with the broadening scope of a belligerent's objectives--in both World Wars, the total subjugation of the enemy--and with the development of new weapons through which these ob-

jectives can be sought, a new look is required at the legal framework by which the world community seeks to regulate the conflict. Given, then, a legitimate military objective--and certainly, in modern warfare, commerce which strengthens the enemy's war effort can be a legitimate military objective--we must expect those measures to be used which can effectively restrict that commerce and which the belligerent has at hand. Any legal system which does not adequately deal with the practicalities of the situation will be just as ineffective as the old blockade rules were in the two preceding major wars. These rules on blockade were simply not sufficiently realistic as to compel general adherence in either of these giant conflicts. So, it seems to me that in this context of all-out war, they were shown to have lost their status as law.

Now I do not mean that these principles have totally lost their usefulness for, perhaps, we can envision a situation where we could expect to see general adherence to them.

A small war, between smaller states, where political objectives remain well limited and where the geographical situation is appropriate may very well see an old traditional type blockade. As a matter of fact, we saw something akin to this in the Egyptian blockade of the Israeli port of Elath. I say "akin" to the traditional blockade because the U.A.R. emphasis was not on shipping but on strategic goods. That is to say, Egypt did not bar all shipping through the Straits of Tiran, but only barred items of strategic goods. She announced that all Israeli shipping, of course, would be fired upon, but that neutral shipping would be required to stop for inspection of their cargo and that any attempt by a neutral to ship strategic goods to Israel would be considered an unfriendly act against all Arab states.

There also was a traditional blockade by the United States against the North Korean coast during the Korean war where there was a favorable geographic situation and limited political objectives. This blockade, according to Messrs. Cagle and Manson, was successfully maintained for 3 years. And, yes, both Soviet and Chinese Communist vessels respected the blockade, although both governments denounced it and refused to recognize its legality or even its existence.

I would like now to discuss three other, but related, situations with you.

The first is the old 19th century concept of pacific blockade--a term which one hears bandied about from time to time. This action has been described as a measure short of war, i.e., where the blockading state does not wish to resort to war but, nevertheless, wishes to resort to some degree of force to obtain redress of a claimed wrong by the opposing state. Hence, pacific blockades arose as a form of reprisal used in a peacetime situation generally by larger states against those less powerful. It consisted of blockading access to or exit from a particular port or ports of the target state, of the vessels of that state. Only the shipping of the blockaded state was affected. Neutral ships, or ships of other nations, are permitted to come and go as they please. There are no recorded instances of this being used in this century, and there are no instances where it was ever used by the United States. I mention it here just so that you will be able to distinguish it from the belligerent type blockade if the need arises.

There are other measures short of war which bear some relevance to the use of seapower in a limited war situation. I refer to the basic right of every state to take such actions at sea as are reasonable and necessary to protect its security interest against the hostile acts of other states. The old case of the U.S. Flagship *Virginius* is frequently cited in support of this proposition. This ship was seized by the Spanish authorities in 1873 while it was in the process of

transporting arms to Cuban insurgents. The British ship *Deerhound* was seized by Spanish warships during the Spanish Civil War for the same reason. And during the Algerian War, French warships stopped at least two ships--one a British and one a Yugoslav, both of which were suspected of the same offense.

The current Market Time operations in Vietnam are also pertinent to our discussion. The Republic of Vietnam decree announcing this operation stated, essentially, that the entry into South Vietnam of goods or personnel through other than recognized ports is forbidden by the South Vietnamese customs and immigration regulations and that it was intended to enforce these regulations strictly. Accordingly, it provided that all vessels within the Republic of Vietnam contiguous zone were subject to visit and search, and arrest where appropriate, for violations of these regulations. It went a bit further and declared that even beyond their contiguous zone, ships suspected of being RVN, although flying another flag, would be stopped, searched, and seized if appropriate.

South Vietnam has done nothing here, of course, that a state cannot legally do in time of peace under the 1958 Geneva Conventions. These are strictly police measures designed to enforce the domestic laws of the RVN seaward throughout their sanitary, fiscal, and customs zone, or contiguous zone, and on the high seas against ships suspected of being their own although flying a foreign flag.

May I simply pose this question to you? Does the *Virginius* case, and the others I cited a moment ago, suggest a rationale for a possible extension of this surveillance?

A final blockade-type situation which compels our attention is the 1962 quarantine of strategic arms to Cuba. This exercise of force at sea was designed by the United States as a response to the Soviet/Cuban missile threat and, certainly, as a measure which, it was hoped, could resolve the situation short of actual conflict.

I call this a blockade-type situation because it was not a blockade in any sense of the word--you will recall that I commenced my remarks with the notation that blockade deals with ships, solely, and not their cargo.

There was never any intention in the Cuban situation to prevent the ingress of ships. The entire thrust of the operation, of course, was on offensive missiles and their component parts. Ships were stopped, and those which were not transporting the prohibited items were permitted to continue their voyage, and a clearcert, or clearance certificate, system, modeled after the old navicert system was initiated to obviate even this inconvenience for ships carrying innocent cargo. This really bears a close resemblance to the prohibition of contraband, also a belligerent right under the traditional law of sea warfare. Bear in mind here that there never was any intention, on anybody's part, that a state of war should exist between the United States and Cuba, or the United States and the Soviet Union, although what has traditionally been a belligerent right was, in essence, exercised.

This, I think, demonstrates my thesis that changing conditions require changing rules and that a law of peace and law of war dichotomy is inadequate in such contemporary situations.

Clearly, the United States could have declared war on Cuba, established a blockade, or announced lists of contraband items; although, undoubtedly, many would have cried that the declaration of war, itself, was violative of article 2(4) of the U.N. Charter. But putting this argument aside for a moment, it certainly seems obvious that a formal state of war should not be required for a state to insist on certain essential protective rights since such would have undoubtedly prejudiced the chances for a peaceful solution of the

matter.

Of course, the lawyers have waxed long and hard on the legality of the quarantine. Some publicists, even some U.S. publicists, have branded it as an unlawful exercise of force under article 2(4) of the Charter. Others, and these are substantially in the preponderance, have argued for its legality, although not always using the same yardstick. The official U.S. position is that the action was legal as a collective action by the American states under articles 6 and 8 of the Rio Treaty in response to a situation endangering the peace of America. Others contend that it was a legitimate exercise of the right of collective self-defense under article 51 of the U.N. Charter.

These latter arguments seem to me to be the more realistic ones and, as such, to be a much more useful part of the continuing development of standards of conduct to which we can generally expect states to conform. To brand as illegal under present law every exercise of armed force, as some do, invites comments like those of former Secretary of State Dean Acheson to the American Society of International Law, shortly after the quarantine.

> I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position, and prestige of the United States had been challenged by another state: and law simply does not deal with such questions of ultimate power--power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. One would be surprised if practical men, trained in legal history and thought, had devised and brought to a state of general acceptance, a principle condemnatory of an action so essential to the continuation of preeminent power as that taken by the United States last October. Such a principle would be as harmful to the development of restraining procedures as it would be futile. No law can destroy the state creating the law. The survival of states is not a matter of law.

Whether or not one agrees fully with these remarks, I do think one must agree that they do point out clearly that in order for restraining procedures to have any hope of effectiveness, they must be premised on a realistic appraisal of what states can be expected to do in particular circumstances.

Now, what is the relevance of all of this to my subject--the legality of the use of certain weapons in a limited war situation?

While we do have some rules of international law in sea warfare which appear definite and certain on their face, this is by no means the true situation. Most of these rules were developed in and for a totally different environment than we face today. While there are, and must be, restraints on the participants in a conflict, whether or not that conflict is characterized as a technical state of war, I think history teaches us that the degree of effective restraint will vary in inverse proportion to the nature of the objectives for which the conflict is being waged; that is, as the objectives become more unlimited, the fewer restraints we can expect the parties to impose upon themselves, and, hence, the fewer constraints the world

BIOGRAPHIC SUMMARY

Capt. William O. Miller, JAGC, U.S. Navy, did his undergraduate work at the University of South Carolina and holds a bachelor of laws degree from Atlanta University and a master of laws degree from The George Washington University. His numerous legal officer assignments include: duties with the Office of the Judge Advocate General as Appellate Counsel, and in the International Law Division; Assistant Legal Officer, Headquarters 14th Naval District; and Assistant Legal Officer, Commander in Chief, Pacific Fleet. Captain Miller is currently a student at the Naval War College, School of Naval Warfare.

community, in the form of law, can hope to impose.

The traditional blockade which we have been discussing provides a good example of this. When faced with a war where the total, organized resources of the enemy became a legitimate military objective, the old rules which sought to separate noncombatants from combatants at sea were not adequate. Nor were those which failed to make allowances for the effect which otherwise normal neutral trade would have on the enemy's war effort. Thus the old 19th century law failed under the strict test of military necessity in a modern context.

But to get back to my subject, I will simply say that in limited war situations, where objectives are limited, there will be more self-imposed restraints and, hence, more constraints in the form of law that can hope to be imposed.

In the Vietnamese situation, for example, our self-imposed restraints are such that we make no effort at all to use force to interfere with the seaborne trade into North Vietnam.

This situation might very well be otherwise, however, if there were to be, for example, a massive invasion across the DMZ. It could very well be that the defense of South Vietnam would require interdiction of North Vietnamese strategic commerce. This situation did develop in Korea. It would not be unrealistic, therefore, to expect, given the right circumstances, something in the nature of a traditional blockade of the North Vietnamse coast.

In seeking to determine the legality of a proposed action, one should not only look to such rules as are found in such publications as *The Law of Naval Warfare*, but he must also study the history of these rules, i.e., the situation for which they were designed and the history of their application. He must also recognize that there are many situations which are simply not covered in the rule books--and it is here, particularly, where the practice of states, if it can be determined, will make possible a better and more meaningful appraisal. As Professor Morgenthau stated the other day, "We deal not with theory, but with experience."

Ψ

Between two groups that want to make inconsistent kinds of worlds, I see no remedy except force.

Oliver Wendell Holmes, Jr., 1841-1935, letter to Sir Frederick Pollock

THE NATIONAL EXECUTIVE AND THE USE OF THE ARMED FORCES ABROAD

A lecture delivered at the Naval War College
on 11 October 1968
by
Professor John N. Moore

The breadth of my assigned topic "The National Executive and International Law" suggests that my mission this morning is about like that of the fan dancer; to call attention to the subject without really covering it. But rather than attempt a superficial survey of the range of problems in allocating the foreign affairs power between Congress, the President, and the Court, it may be more rewarding to instead concentrate on the currently most important of those problems, the power of the President to use the Armed Forces abroad.

Historically, the controversy over the war power and the controversy over the treaty power seem to have been the most important constitutional issues in the scope of the President's foreign affairs power. Of these, the treaty power controversy has been in at least a state of temporary quiescence since the heated controversy in 1954 over the Bricker amendment. With the defeat by a narrow margin of the Bricker amendment, which had been aimed at restricting the President's power to make international agreements, this controversy was resolved in favor of a con-

Naval War College January 1969 Full Issue

tinuing broad view of Executive authority. In contrast, the debate on Vietnam has heated white hot the controversy over the extent of Presidential power to use the Armed Forces abroad, and has generated a concern with Presidential power as insistent as any in our century.[1]

Basically the controversy concerns the authority of the President to order the Armed Forces into combat abroad and the question of when and how Congress must authorize the use of the Armed Forces abroad. Although this problem is presented more dramatically today than ever before, it is not new. Much of the current debate borrows argument from the clashes of Jefferson and Hamilton over the power of the President in the 1801 naval war against the Bashaw of Tripoli and from the rhetoric of President Polk and Representative Abraham Lincoln in the 1846 Mexican War.

The starting point of the debate is the Constitution, which gives Congress the power to declare war and to raise and support Armies and which makes the President the Commander in Chief and in practical effect the chief representative of the nation in foreign affairs. It seems reasonably clear from the debates at the Federal Constitutional Convention that most of the framers sought to place the major war power in Congress and to leave the President only the right to repel sudden attacks. The framers sought this restriction on Presidential power because of their fear of concentrated power in the President. But the convention debates are not very useful in telling us who has power in situations which may be short of war or in resolving controversy about how Congress might authorize the President to use the Army and Navy. Moreover, the Constitution is a living document, and its meaning is shaped by the experience of successive Congresses and Presidents in filling in its broad outlines and in adapting it to changing circumstances. As Mr. Justice Frankfurter pointed out: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[2] Nowhere is this statement or that of Mr. Justice Holmes that "the life of the law has not been logic: it has been experience"[3] been more apt than in the interpretation of the war power.

In the 180 years since the adoption of the Constitution, our nation has moved from a position of comparative isolation epitomized by Washington's warning to stay clear of entangling alliances to one of intense international involvement evidenced in 1968 by agreements for collective defense with 42 countries. In the same period the international system has shifted from a balance of power system to a loose bipolar system marked by intense global competition among competing public order systems and a nuclear balance of terror. And international law has moved from the notion of a just war to the prohibition of all force as a means of major change under the U.N. Charter. The increasing involvement of the United States in world affairs, the shift to an intensely competitive bipolar system, and the limitation of the lawful use of force to defense have greatly strengthened the hand of the Executive in the contest with Congress over the war power. Hamilton and Jefferson fought over whether, in the absence of congressional authorization to use force, a Tripolitn cruiser must be released after capture by an American naval vessel. Jefferson took the position that in the absence of congressional authorization for U.S. Naval forces to go on the offense, the cruiser must be released after being disabled from committing further hostilities. But the contemporary debate is about the power to commit from a quarter to a half million troops in major wars such as Korea and Vietnam. As the contrast in subjects

Naval War College Review, Vol. 22 [1969], No. 1, Art. 1

debated shows, there has been a gradual increase in Presidential power to use the military abroad over this period, an increase which has accelerated during the 20th century.

Some commentators such as Professor Wormuth and Senator Fulbright tell us that the increase in Presidential power vis-a-vis Congress has gone too far. They paint a picture of Executive usurpation of authority. But though they have a great deal to show us, the trouble is that the frame they use may be too small. We cannot just look to the language of the Constitution or the experience of 150 years ago for the answer to problems and conditions not wholly anticipated. If we are to display a proper instinct for the jugular instead of an instinct for the capillaries, we must apply the policy of the framers to the diverse problems and conditions of today.

The policy of requiring congressional authority for the major use of force abroad as a check on Presidential power remains as valid today, if not more so, than in 1789. But problems of collective defense pursuant to treaty obligations, the need for implementation of sanctions under article 42 of the United Nations Charter, an increasingly global defense interdependence, the wide range of responses to situations of intrastate conflict, and the swiftness of modern attack militate against absolute answers based on that policy.

The nature of our problem is such that we are unlikely to find many of what Mr. Justice Frankfurter termed bright-line distinctions. It will help immeasurably, however, if we first briefly indulge in the luxury of a minimum of clarification about the nature of the major questions we must deal with. Although there are really many more, as a first-stage complexity it is convenient to take four questions. With each we are concerned with authorization to use the Armed Forces abroad in conflict situations.

First, what may the President do on his own authority without congressional authorization? Second, if congressional authorization is necessary, what form must it take? Must there be a formal declaration of war? Third, what terms of congressional authorization are valid? Can Congress delegate the authority to use troops abroad to the President, and, if so, how broad a delegation is permissible? Lastly, to what extent can the answers to the first three questions be resolved by the courts? Are they "political questions" or otherwise issues which it is unwise for a court to adjudicate? Failure to separate these questions has carried more than its share of confusion. I will deal with these one at a time and then apply them all to the Vietnam situation.

First, what may the President do on his own authority without congressional authorization?

There is no doubt that the President, acting on his own authority, may order the military to repel sudden attacks on the United States or American forces. The draft proposals of the Constitution initially contained language authorizing Congress to "make war," but at the instance of James Madison the language was changed from "to make war" to "to declare war." The reason given for the change was to leave to the President "the power to repel sudden attack." Beyond that, there is greater controversy. On the one hand, there are those who take a broad view of Presidential power such as Craig Mathews who writes:

> Constitutional history has shown that the President can take military action under his independent powers whenever the interests of the United States so require. In the modern world the scope of America's interest can be determined only by reference to the state of affairs in the international arena as a whole and to the overall purposes of our foreign policy. Any rigid test of protectable interest would leave the nation dangerously unequipped for survival.[4]

Similarly, Under Secretary Katzenbach, in testifying recently before the Senate Foreign Relations Committee, said that he doubts that any President has ever acted to the full limits of his Presidential authority.[5] There is substantial precedent in history for this broad interpretation of Presidential authority. Former Assistant Secretary of State James Grafton Rogers tells us that in the over 100 uses of U.S. forces abroad from 1789 to 1945 that the Executive ordered the use on his own authority in at least 80.[6] And a 1951 study for the Committee on Foreign Relations says that: "Since the Constitution was adopted there have been at least 125 incidents in which the President, without congressional authorization, . . . has ordered the Armed Forces to take action or maintain positions abroad."[7]

Since these studies were completed we could add President Truman's use of a quarter of a million American troops in Korea, President Eisenhower's landing of the marines in Lebanon, President Kennedy's limited use of American forces in the Bay of Pigs invasion and as "advisers" in Vietnam, and President Johnson's landing of troops in the Dominican Republic. All of this certainly represents a substantial gloss which experience has placed on the Constitution.

On the other hand, those who take a narrow view of Presidential power, such as Professor Ruhl Bartlett in testimony before the Senate Foreign Relations Committee during the National Commitment hearings, point out that most of these actions, with the greatest exception being Korea, did not involve sustained hostilities or more than minor casualties.[8] Typically, they involved protection of U.S. citizens abroad, pursuit of pirates, alleged humanitarian intervention, reprisals, or consensual assistance to a recognized government. And protracted and sustained use of troops abroad resulting in substantial casualties has usually been highly controversial; the Korean war and President Polk's initiation of the Mexican War of 1846 being prime examples.

Given this degree of disagreement by sincere and informed scholars, what guideposts are there for delimiting Presidential authority in those situations in which the President acts without congressional authorization? Although they can easily be overstated, there are some policy considerations which, in my opinion, suggest a need for substantial Presidential authority. First, there is a need for the President to be able to quickly react to sudden armed attacks threatening U.S. defense interests. The sudden attack in Korea and the rapid response of President Truman in initiating a process of troop commitment to Korea is, I believe, a real example of this need. Though subject to abuse, possibly some actions to protect American citizens abroad fall into an analagous category. The joint United States-Belgian rescue operation in the Congo and the first stage of the Dominican operation are examples. There is also sometimes a need for secrecy, decisiveness, and negotiating responsiveness which can best be met by Presidential action. In this category I would cite the actions of President Kennedy in the Cuban missile crisis. It seems to me that the wisdom of congressional debate about whether the response to the Soviet emplacement of medium-range ballistic missiles in Cuba should be quarantine, air strikes on the missile sites, invasion of Cuba, or no response at all, which is the debate which went on within the administration, is open to serious doubt. Robert Kennedy tells us in his account of the missile crisis that he doubts as satisfactory an outcome could have been achieved if the debate over alternatives had taken place in the full glare of publicity. And lest we succumb to the myth that the President is always hawkish and Congress is always dovish, we should remember Kennedy's account of

Naval War College Review, Vol. 22 [1969], No. 1, Art. 1

the hawkish pressures from leading Congressman during the missile crisis.

There is also a category of what might be called "ongoing command decisions," which are day-to-day decisions about the operation of existing military assistance programs within the network of U.S. defense interests or about defensive deployment of our Armed Forces. By their recurrent nature, many of these decisions inevitably will be left, in the first instance at least, to Presidential authority. Examples would be the conduct of established military advisory missions, military assistance programs, and intelligence missions necessary for national security. Moreover, I believe that some of the arguments for strictly limiting Presidential authority misconceive the nature of Presidential power and elevate form over substance. Presidential power, even in the exercise of the Commander in Chief power, is not autonomous and, as Richard Neustadt compellingly argues, is in large measure the power to persuade.[9] It is difficult for a President to pursue sustained military actions without the active support of a substantial segment of Congress and the American people. And although Congress would usually be reluctant to do so, if things got too bad Congress could refuse to appropriate funds or could even institute impeachment proceedings against the President. And short of these measures, the Congress can bring great pressure to bear on the President through the power of critical public hearings, as the Fulbright hearings on Vietnam perhaps more than adequately demonstrate.

Despite these reasons for some Presidential authority in the use of troops abroad, it neither seems wise nor necessary to encourage too great an expansion of Presidential power. Within the limits of survival in the world we live in, we should require the more broadly based authorization which only Congress can give and should strive to revitalize the role of Congress in the making of foreign policy.

As a dividing line for Presidential authority in the use of the military abroad, one test might be to require congressional authorization in all cases where regular combat units are committed to sustained hostilities. This test would be likely to include most situations resulting in substantial casualties and substantial commitment of resources. Under this test, the Mexican War, the Korean war, and the Vietnam war would all require congressional authorization. The test has the virtue of responsiveness to precisely those situations historically creating the greatest concern over Presidential authority, but like all tests is somewhat frayed at the edges. In conflicts which gradually escalate, the dividing line for requiring congressional authorization might be initial commitment to combat of regular U.S. combat units as such. As to the suddenness of Korea, and conflicts like Korea, I would argue that the President should have the authority to meet the attack as necessary but should immediately seek congressional authorization. In retrospect, the decision not to obtain formal congressional authorization in the Korean war, in which the United States sustained more than 140,000 casualties, seems a poor precedent. And in those situations in which Presidential authority is based on the need for secrecy or immediacy of response, the need should be a real one.

To say that the President should have authority to act in some circumstances without congressional authorization is not to advise that he should not consult Congress or key congressional leaders. The President should involve Congress as much as practicable in every case. In fact, failure to pursue congressional involvement meaningfully when it could have been done has been the cause of a great deal of unnecessary Presidential grief. As Under Secretary Katzenbach points out "there can be no question

that . . . [the President] acts most effectively when he acts with the support and authority of the Congress."[10]

The second question is: When congressional authorization is necessary, what form should it take? Is a formal declaration of war required?

Much of the popular discussion about the war power seems to assume that a formal declaration of war is the only means of constitutionally obtaining congressional authorization for the use of the military. But this one is largely a red herring. As a matter of logic, the syntax of the Constitution that "Congress should have power . . . to declare war" does not mean that Congress may not authorize hostilities without a formal declaration of war. And as a matter of intent of the framers, the requirement is congressional control of hostilities, not a particular mode of authorization. This was so clear that within 12 years of the adoption of the Constitution no less an authority than Chief Justice John Marshall recognized in the case of *Talbot v. Seeman*[11] that congressional action not amounting to a formal declaration of war could be a valid congressional authorization of hostilities. The case arose out of the 1789 naval war with France, the first war of a fledgling United States. As a result of French raiding of American shipping, Congress had passed a series of acts suspending commercial relations with France, denouncing the treaties with France, and establishing a Department of the Navy and a Marine Corps. The Court treated these acts as congressional authorization for limited hostilities with France. Practice since then shows that Congress has declared war only five times, despite the much larger number of occasions on which the United States has been at war. There is little reason, then, to believe that a formal declaration of war is the only means of congressional authorization of hostilities. A joint congressional resolution, which must be approved by both houses of Congress, authorizing the President to use the military abroad is certainly as Under Secretary Katzenbach puts it "a functional equivalent of the declaration of war."

There are also numerous policy arguments why the formal declaration of war is undesirable under present circumstances. Arguments made include increased danger of misunderstanding of limited objectives, diplomatic embarrassment in recognition of nonrecognized guerrilla opponents, inhibition of settlement possibilities, the danger of widening the war, and unnecessarily increasing a President's domestic authority. Although each of these arguments has some merit, probably the most compelling reason for not using the formal declaration of war is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out "[T]here has not been a formal declaration of war--anywhere in the world--since World War II."[12]

More serious questions as to form of congressional authorization include to what extent can Congress authorize the President to engage in hostilities by prior approval of an international agreement? And to what extent can congressional acquiescence in appropriation measures constitute congressional authorization to engage in hostilities? One obvious problem with treaty authorization is that although the House of Representatives would participate in a declaration of war, it would not participate in treatymaking. This objection would be alleviated if the international agreement took the form of a congressional-executive agreement sanctioned by a joint resolution. Problems in recognizing appropriation measures as authorization include confronting Congress with a *fait accompli* and ascertaining the scope of congressional intent in a vote to approve an appropriation measure.

The third question is: What terms of congressional authorization are valid?

Can Congress delegate the authority to use troops abroad to the President, and if so, how broad a delegation is permissible?

The permissibility of congressional delegation of the war power to the President and exactly what constitutes a delegation have been disputed throughout U.S. history. In 1834 President Jackson sought congressional authorization to undertake reprisals upon French property unless France paid her outstanding debts for damages to American shipping during the Napoleonic wars. There were objections in Congress on the grounds that it would amount to an unconstitutional transfer of Congress' war power to the President, and Jackson did not get his resolution. Similarly, in 1857 President Buchanan sought congressional authorization to use the military at his discretion, if necessary to preserve freedom of communication across the Isthmus of Panama. Despite three requests, Congress refused to grant Buchanan the authority he requested. A principal argument against granting his request was that to do so would be a surrender to the President of Congress' war power. The objection was again raised by Senators opposed to President Wilson's request for congressional authority to take defensive measures in protection of American shipping. Corwin tells us that Wilson went ahead and armed American merchant vessels despite congressional inaction.

More recent experience has seen Congress take a broader view on the delegation issue. In the 1945 United Nations Participation Act, Congress provided for delegation of authority to the President to engage in hostilities if acting pursuant to an article 43 U.N. collective peace force agreement approved by Congress. Apparently, however, no such agreement has yet been approved by Congress. And in the 1955 Formosa Resolution, the 1957 Middle East Resolution, and the 1964 Tonkin Gulf Resolution, Congress authorized the President to use force to assist certain areas if subjected to armed attack. In the case of the Formosa Resolution, the Middle East Resolution, and the Tonkin Gulf Resolution, all were passed over the objection of at least one Congressman, Senator Wayne Morse, that the resolution amounted to an "unconstitutional predeclaration of war." In none of these situations does the delegation issue seem to have been considered very adequately, and the practice is probably inconclusive.

Professor Wormuth, arguing largely on the basis of now defunct precedents of domestic delegation law, urges a strict antidelegation rule.[13] But the domestic delegation analogy concerned with the limits of congressional delegation of legislative power is not only questionable today, but is also of only limited usefulness in the war power context. The President has in his own right both substantial authority to use the military abroad and authority as Commander in Chief, neither of which are present in comparable degree in the domestic delegation cases.

And in view of the great power of the President to pursue a diplomatic course leaving Congress little choice but war, and his great discretion as Commander in Chief after formal congressional authorization is given, it seems somewhat quixotic to take a rigid antidelegation stance. Moreover, there are substantial problems in any antidelegation stance as to when Congress is granting authorization with full knowledge of the circumstances. And what is the standard for too broad a delegation? Certainly the test would be unrealistic if simply one of whether discretion is left to the President, as the President probably always has the right as Commander in Chief to refuse to order American troops into combat. And unless Congress speaks to the issue, he certainly has very crucial discretion as to theater of operations, weapons systems employed, and settlement terms, any of

which can be as decisive for conflict limitation as the original decision to use force.

It is hard to get away from the fact that the war power is in reality a joint executive-congressional power and that the President is always going to have a substantial discretionary role. The delegation problem is more likely to be resolved by a pattern of practice responding to felt needs than by overly neat *a priori* constitutional hypotheses. If there is to be a delegation test, I would suggest that it be one asking whether there has been meaningful participation by a Congress reasonably informed of the circumstances giving rise to the need for the use of U.S. forces.

The fourth question is: To what extent can the answers to the first three questions be resolved by the courts? Are they "political questions" or otherwise issues which it is unwise for a court to adjudicate?

The tradition of judicial review runs deep in the American system. But it is not every question that is suitable for judicial review. Considerations of lack of manageable standards and interference with another coordinate branch of Government are reasons which the Supreme Court has given for declining to decide a question. These considerations frequently arise in the separation-of-powers context and are all present to some degree in judicial determination of the scope of Presidential authority to use the Armed Forces abroad. For example, what could a court do which would not have a major adverse impact on the course of a war if it wanted to declare the war unconstitutional? This dilemma has led one ingenious advocate to argue that the Court should give a declaratory judgment in such circumstances. According to him, "a declaratory judgment would give little comfort to the other side in the negotiations since the Executive can always go to the Congress for a declaration of war if the negotiations break down."[14]

If that is the case, one wonders why the need for a declaratory judgment. And in any event, the suggestion shows a most unprofessional naivete in understating the possible impact of such a ruling.

For these and other reasons, a U.S. District Court in Kansas last July dismissed a class action instituted against the President, the Secretary of State, and the Secretary of Defense seeking a declaratory judgment that they had acted unconstitutionally in the Vietnamese war.[15] Though the scope of the President's authority to use the Armed Forces abroad is a constitutional question, it is a question in separation of powers with few manageable standards, often running great risk of serious interference with legitimate defense requirements, and which is probably subject to more lasting solution from the continuing interplay between the checks and powers of Congress and the President. Though I believe that a decision on the merits would uphold the constitutionality of the executive-congressional action in the Vietnam war, the refusal to adjudicate the issue is certainly the wisest course during the continuation of the conflict. There are, after all, other checks in our system than judicial review, the chief among them being the election of a President.

Let me briefly apply these tests to the constitutional issues in the Vietnam conflict. First, the present magnitude of the Vietnam war in terms of troop levels, casualties, and impact on the nation strongly militates for requiring congressional authorization. I would say that the point at which congressional authorization should be required in Vietnam was the initiation in February 1965 of the regular interdictive air attacks against the North and the first sustained use of regular U.S. combat units in the summer and fall of 1965.

And though I believe that at the current level of hostilities congressional authorization should be required, given

Naval War College Review, Vol. 22 [1969], No. 1, Art. 1

the Korean experience and the breadth of Executive authority acquiesced in by both Congress and the President for the last 50 years, argument to the contrary can certainly be in good faith.

Second, congressional authorization need not and should not take the form of a formal declaration of war. A joint resolution authorizing the use of combat forces in hostilities in Vietnam, such as the Tonkin Gulf Resolution of August 1964, is preferable and adequate. Preferable since there is no good reason to declare war, since a formal declaration of war might connote an objective of subjugating North Vietnam and thus widening the war, and since avoidance of NLF recognition at too early a stage in the negotiating process or prior to reciprocal concessions may be an important diplomatic goal. And adequate since Congress authorized President Johnson to use the Armed Forces "to assist any member or protocol state of SEATO requesting assistance in defense," and the President's use of U.S. forces in Vietnam pursuant to this resolution is constitutionally authorized executive-congressional action. Some argue that Congress was not aware of the magnitude of the war which it was authorizing, that the Tonkin Gulf Resolution was hurried through Congress with a sense of urgency precluding adequate consideration, that Congress was poorly informed as to the extent of attacks on American ships, and that therefore the resolution cannot be taken as sufficient congressional authorization. But the language of the resolution is certainly broad enough to include the present hostilities. It is that "Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." And I believe that a fair reading of the congressional debates in their entirety shows that although there was confusion and disagreement about the scope of the authorization, the Congress and the Senate floor leader of the resolution, Senator Fulbright, were aware that Congress was giving the President the authority, within his discretion, to take whatever action he deemed necessary with respect to the defense of South Vietnam. In fact, that is the wording of an exchange on the floor of the Senate between Senators Fulbright and Cooper. The same exchange indicated an understanding that the resolution was intended to ratify the constitutional process requirement of article IV of the SEATO Treaty.[16]

Although consideration of the Tonkin Gulf Resolution was hasty, President Johnson clearly went to Congress because of his awareness of doubts raised during the Korean war as a result of President Truman's failure to request formal congressional authorization. The attacks on American ships in the Gulf of Tonkin were the opportunity but not the object of the resolution.

The Tonkin Gulf Resolution has also been attacked as an invalid delegation of the congressional war power. But even if there is a constitutional requirement as to the breadth of congressional delegation of the war power to the President, a proposition open to considerable doubt, the Congress which passed the Tonkin Gulf Resolution was, I believe,

BIOGRAPHIC SUMMARY

Professor John Norton Moore is Associate Professor of Law at the University of Virginia School of Law. A graduate of Duke University School of Law, he holds a master of laws degree from the University of Illinois and is a doctoral candidate at Yale Law School. His writings on the lawfulness of U.S. action in Vietnam have been widely publicized.

reasonably informed of the circumstances giving rise to the need for the use of U.S. forces. It was aware that there was an ongoing guerrilla war in Vietnam which had been escalating since 1959, that the United States had had over 12,000 advisory troops there since 1962, a figure dramatically on the increase since then, and that recently the President had ordered retaliatory air strikes on facilities in the North. As such, Congress was validly exercising its war power no matter how desirable or illuminating additional debate might have been.

Although there are, as indicated, difficulties in reading too much into appropriation measures or other indicia of congressional authorization, the subsequent refusal to repeal the Tonkin Gulf Resolution and passage of military appropriation measures also lend some congressional authority to President Johnson's actions. This is particularly true of the $700 million special Vietnam appropriation measure of May 1965. This measure, requested shortly after President Johnson's major step-up of the U.S. response, was billed as an opportunity for expression of congressional opinion on the buildup.

Lastly, although there are those who argue for judicial review of the constitutionality of the authorization of the use of American forces in Vietnam, the lack of standards, the availability of other checks in the system, and the possibly grave impact on the course of negotiations strongly suggest the lack of wisdom of judicial review of such questions while the war continues. Without passing judgment on all future questions which may arise, the constitutional questions involved in the use of the Armed Forces in Vietnam should best be left to resolution between Congress and the President and almost certainly will be.

If in grappling with these questions there is a complexity that tends to overwhelm, or if we vacillate from time to time in our thinking as to precisely where the line should be drawn, we can take comfort in Arthur Schlesinger, Jr.'s point that sometimes the genuine intellectual difficulty of a question makes a degree of vacillation and mind changing eminently reasonable.

FOOTNOTES

1. See generally on the national executive and the use of the Armed Forces abroad Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th rev. ed. (New York: New York University Press, 1957); Francis D. Wormuth, *The Vietnam War: the President v. the Constitution* (Santa Barbara, Calif.: Center for the Study of Democratic Institutions, April 1968); P. Kurland, "The Impotence of Reticence," *Duke Law Journal*, 1968, p. 619; John N. Moore and James L. Underwood, "The Lawfulness of United States Assistance to the Republic of Vietnam," *Congressional Record*, 14 July 1966, p. 14,943, 14,960-14,967, 14,983-14,989; Lawrence R. Velvel, "The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable," *Kansas Law Review*, v. XVI, 1968, p. 449; U.S. Congress, Senate, Committee on Foreign Relations, *U.S. Commitments to Foreign Powers*, Hearings (Washington: U.S. Govt. Print. Off., 1967); U.S. Congress, Senate, *National Commitments Report*, no. 797 (Washington: 1967).

2. Felix Frankfurter, "Youngstown Sheet and Tube Co. v. Sawyer," U.S. Supreme Court, *Decisions* (Washington: 1952), v. 343, p. 579, 593.

3. Mark DeW. Howe, *Justice Oliver Wendell Holmes* (Cambridge: Harvard University Press, 1957), v. I, p. 26.

4. Craig Mathews, "The Constitutional Power of the President to Conclude International Agreements," *Yale Law Journal*, January 1955, p. 345, 365.

5. *U.S. Commitments to Foreign Powers*, p. 76.

6. James G. Rogers, *World Policing and the Constitution* (Boston: World Peace Foundation, 1945), p. 78.

7. A study prepared by the executive departments, *Powers of the President to Send the Armed Forces Outside the United States,* 28 February 1951.

8. *U.S. Commitments to Foreign Powers,* p. 9-21.

9. Richard E. Neustadt, *Presidential Power* (New York: Wiley, 1964).

10. *U.S. Commitments to Foreign Powers,* p. 76.

11. U.S. Supreme Court, *Decisions of the Supreme Court in the Case of the Amelia* (Washington: 1801), v. V, p. 1, 25.

12. Robert S. McNamara, "Address," *The New York Times,* 19 May 1966, p. 11:1-8.

13. Wormuth.

14. Velvel, p. 449, 484.

15. "Velvel v. Johnson," 287 F. Supp. 846 (1968).

16. "Maintenance of International Peace and Security in Southeast Asia," *Congressional Record,* 16 August 1964, p. 18,409-18,410. The relevant exchange was:

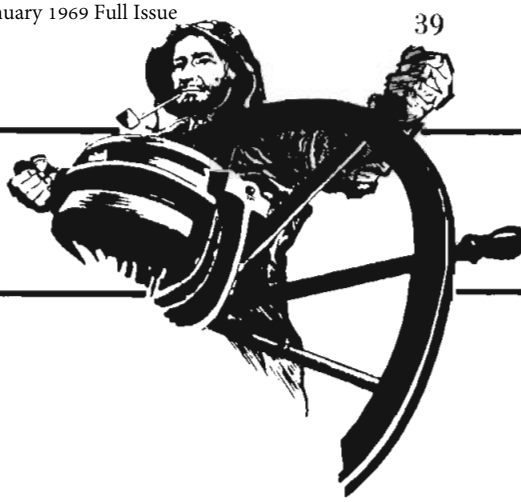
> Mr. *Cooper.* . . . Does the Senator consider that in enacting this resolution we are satisfying that requirement (the constitutional processes requirement) of Article IV of the Southeast Asia Collective Defense treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?
>
> Mr. *Fulbright.* I think that is correct.
>
> Mr. *Cooper.* Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?
>
> Mr. *Fulbright.* That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution. . . .

For a compilation of excerpts from the congressional debates supporting a broad interpretation of presidential authority under the Tonkin Gulf Resolution see Moore and Underwood, p. 14,943, 14,960-67, 14,983-89. For a highly selective compilation of excerpts suggesting a narrower interpretation see Velvel, p. 473-77. To resolve the controversy, a reading of the debates in their entirety is suggested.

Ψ

The deterrence of war is the primary objective of the armed forces.

Maxwell D. Taylor: The Uncertain Trumpet, 1960



SET AND DRIFT

Public Affairs. The annual Public Affairs Study of the Naval War College held from 24 to 25 October 1968 was of particular importance this year as it dealt not only with normal public affairs duties and procedures but with the obligations and responsibilities of the news media with special emphasis on the role of the press in Vietnam.

Experienced newspapermen, Government information officers, educators, and industrial public relations experts joined with naval public affairs specialists in discussing the problems and future needs of both the news media and the services in the search for a procedural balance acceptable to a democratic society.

Nearly 300 U.S. officers of the resident schools spent 2 days dealing with the essentials of public affairs as an important consideration in all levels of military planning. More than 25 military and civilian public affairs specialists participated as lecturers, panelists, and consultants in this study. Lecturers included the Assistant Secretary of Defense for Public Affairs, Mr. Phil G. Goulding, who led the program off with

Secretary Goulding (left) is accompanied by Vice Admiral Colbert, (right), President, Naval War College, to Pringle Auditorium. In background is Rear Admiral Lawrence R. Geis, USN, Navy Chief of Information.

a lecture entitled "Public Affairs within the Department of Defense"; Rear Adm. Lawrence R. Geis, Chief of Information, U.S. Navy, who discussed "Public Affairs and Command"; and Mr. L. Howard Bennett, Director, Civil Rights Office of the Assistant Secretary of Defense (Manpower and Reserve Affairs), who spoke on "Public Affairs in Relation to Civil Rights." Besides these lectures, a panel discussion on "The Obligations and Responsibilities of the News Media" was conducted by Mr. Howard R. Simpson, a Faculty Adviser and Consultant on U.S. Information Agency matters. The distinguished panel for this discussion included: Mr. Barry Zorthian, Special Assistant to the Director, U.S. Information Agency; Dr. Robert F. Delaney, Director, Edward R. Murrow Center of Public Diplomacy, The Fletcher School of Law and Diplomacy, Tufts University, and Foreign Affairs columnist, *Boston Sunday Globe;* Mr. Larry Norman, Pentagon correspondent for *Newsweek;* and Mr. John A. Johnson, Vice President of Public Relations and Advertising, Ling-Temco-Vought Inc.

Mr. Zorthian, who served in Vietnam for 4 years as Director of JUSPAO and Mission Press spokesman, emphasized the need for all commanders to have an understanding of the press and information media, particularly in an era when improved communications and electronic reporting bring military operations into the living rooms of the world.

The study established the public affairs role as one essential to both diplomatic and military objectives and one that the modern officer ignores or rejects at the expense of his organization and himself.

Naval Command Course Washington Field Trip. Students of the Naval Command Course recently returned from the first of four major field study trips scheduled throughout the academic year. This trip, the Washington Military Field Study Trip, was 10 days in duration and consisted primarily of visits to various departments and offices of the U.S. Government in Washington, D.C., with associated trips to Annapolis, Md.; Camp Lejeune, N.C.; and Fort Bragg/Pope Air Force Base, N.C.

This trip provided the Naval Command Course students an opportunity to view the working of the Federal Government by visiting selected Government and military activities in the Washington, D.C. area. The points of interest included the White House, where they were addressed by Special Assistant to the President, Walt W. Rostow; the Department of Labor where they heard Under Secretary James J. Reynolds; the Judicial Branch where they were addressed by Associate Justice Byron R. White; the Department of State, where they received a briefing from the Director of Intelligence and Research, Mr. Thomas L. Hughes; and Congress, where they had lunch with Congressman William S. Mailliard, Republican from the 6th District of California. Besides these visits, they observed BRASS STRIKE III, a Joint Army/Air Force firepower demonstration at Fort Bragg/Pope Air Force Base; a U.S. Marine firepower and amphibious operation conducted at Camp Lejeune; and spent a day observing academic processes at the U.S. Naval Academy. This latter visit represented a homecoming for three of the foreign officers as they are graduates of the Academy--Comdr. Federico S. Sinlao of the Philippine Navy, Comdr. Geraldo S.C. Guimaraes of the Brazilian Navy, and Comdr. Osvaldo M. Fourzan of the Mexican Navy.

Ψ

RECOGNITION OF STATES AND GOVERNMENTS:

An Introductory Survey

A lecture delivered at the Naval War College
on 12 September 1968
by
Professor Brunson MacChesney

The problems involved in the subject of recognition in international law are important ones, even though they lack the dramatic appeal of such topics as war and peace, outer space, and ocean space. Since states are the basic units in the international legal system, recognition plays a vital role in the determination of the qualified actors in the system. Similarly, what government represents a state is a significant matter. Moreover, the exercise of jurisdiction by alleged states and governments may depend for its effectiveness on recognition. The subject is not an easy one to explain or understand. There is a vast amount of state practice that is far from consistent, a clash of doctrinal explanation, and a bewildering variety of terminology.

Recognition involves the question of what attitude states will take with regard to a variety of factual situations and the legal consequences that flow from formal recognition of these situations, as well as from the nonrecognition of such situations. Major areas concern the existence of states, governments, war, neutrality, belligerency, and the effect of nonrecognition of illegal

claims to territory. The primary focus of this lecture will be on the problems arising out of recognition and nonrecognition of states and governments.

The requisites for statehood in international law have been formulated in various ways, but there is substantial agreement that there must be an independent government exercising effective authority within a relatively well-defined area. The major doctrinal controversy has been whether a new entity with these characteristics becomes a state only through recognition by the existing states in the world community, or whether the attainment of the requisite factual characteristics by a new entity makes it a state prior to any recognition by existing states? In the books, the controversy is referred to as one between the constitutive and declaratory theories of recognition.

The traditional constitutive theory has been that new entities do not become states until they are recognized; i.e., that only recognition constitutes the state, and that each existing state is under no duty to recognize a new entity that has attained the requisite factual characteristics. In the absence of any procedures for collective recognition of a new entity, this meant that an entity might be recognized by some states but not by others. A further theoretical consequence was that the new entity, if unrecognized, was not a subject of international law and therefore allegedly had no rights or obligations under international law.

The late Professor Lauterpacht made an important modification in constitutive theory by arguing that existing states were under a duty to recognize a new entity that met the requisite factual characteristics. His book on recognition elaborates his argument and purports to find support for it in state practice. His argument, if accepted in practice, would do much to obviate the possibilities of an entity being recognized by some states and not by others. It would introduce order into a vital aspect of international relations. It would also, if similarly accepted, decrease the practical importance of an entity theoretically not subject to rights and duties under international law.

Under the declaratory theory, an entity which attains the requisite factual characteristics thereby commences its existence as a state under international law without the need of recognition by existing states and is accordingly from that point forward a subject of international law with all the rights and duties of a state. Recognition, under this theory, serves only to declare what already existed and to indicate a willingness on the part of the recognizing state to accord the recognized state the privileges of a state. This is normally accompanied by the opening of diplomatic relations between the two states. Under this theory the recognizing state is also under no duty to recognize the new entity, but, since, under that theory, the entity is already a state, the conceptual and practical difficulties posed by the constitutive theory do not arise.

Another way of stating the same problem is to ask whether recognition is governed by legal rules or is dominated by political considerations. Lauterpacht's constitutive theory favors the former while the declaratory view favors the latter. Most modern Anglo-American writers disagree with Lauterpacht. And, in my opinion, state practice, as a principal creator of international law, lends more support to the declaratory and political views. This is not to say that states totally ignore legal considerations or that in many instances states do not reach the same results regardless of theories.

Although the foregoing discussion related to the recognition of states, the same controversy exists with respect to recognition of governments of existing states. The United States both in theory and practice adheres to the declaratory

view, as was vigorously demonstrated by Ambassador Austin in the United Nations in defending the immediate recognition of the provisional government of Israel as the *de facto* authority of the new state. On the other hand, the United Kingdom, in an official statement by the Foreign Secretary in 1951, defined their recognition policy in constitutive terms. Although their recognition of the Communist Chinese Government could be considered as consistent with that theory, their relations with some other Communist regimes is impossible to square with that theory. An example is their continued nonrecognition of East Germany.

It is apparently paradoxical that, while there is no agreement with respect to the legal character of recognition, there is a substantial consensus that premature recognition is a violation of international law. For example, a state that recognizes a new entity that does not have the requisite characteristics has injured the existing state out of which the new entity claims to have formed a state. By way of analogy, in our Civil War the United States claimed that Great Britain's Proclamation of Neutrality, which consequentially recognized the belligerency of the Confederate States, was premature. In view of the prior United States Proclamation of a Blockade, our argument was clearly unsound. However, it should be noted that Great Britain never recognized the Confederacy as a state or government but only as a belligerent.

This reference to belligerency as an intermediate status short of recognition as a state or government leads conveniently to a discussion of the use of the terms *de facto* and *de jure* in connection with recognition. The terms are used in different contexts and are not given a consistent meaning. Sometimes, *de facto* is used to indicate that the recognition being extended is tentative. It is not the recognition that is *de facto*: the other state or government is being treated as a *de facto* entity. The term is also used to describe policies of recognition. An example is the extending of recognition to any regime that is in effective control of the state regardless of other considerations. Although the question is debatable, it is believed useful in practice to be able to deal with recognition in stages and permit the intermediate step of recognizing a regime as *de facto* prior to a possible further recognition as a regime *de jure*.

The problem of recognition of states obviously occurs less frequently than the question of recognition of governments. Although occasionally a new state has emerged from a territory not previously organized as a state, the more typical issue arises out of an attempt by a rebel group to secede from a parent state, either in part of its existing territory, or in what was formerly, for example, a colonial territory. In this context it is easy to understand why premature recognition was an offense.

As previously indicated, the generally accepted test of statehood is that of an independent government exercising effective authority within a relatively defined area. Implicit in these requirements, or possibly an additional criterion, is that it reasonably appears that these requirements will continue to be satisfied. The practice of the United States until recent times has been fairly consistent in the application of this test to new entities seeking statehood. It is perhaps best illustrated in the course of our recognition of the new states in Latin America in the early 19th century. The United Kingdom has, until recent times, also followed essentially the same policy. Since World War II our action with respect to the government of Communist China, and the alleged states and governments of East Germany, North Korea, and North Vietnam has been based on different considerations. As Kaplan and Katzenbach point out, recognition, or rather nonrecognition, in relation to the opposing bloc, is

primarily a political weapon. In the absence of an overall settlement, these other alleged governments and states seem reasonably permanent, yet we will continue to withhold recognition. Although, after World War I, the question of recognition of the Soviet Government was not, technically, a matter of recognition of a state, their drastic break with the past made it a similar question in policy terms.

Since World War II, and particularly in recent years, our practice with respect to the recognition of new states in Afro-Asia has also been based on different criteria. Here, the rapid ending of colonialism and the planned preparation of new states for independence, either under the auspices of the United Nations or by the parent powers such as England and France, has led to almost instantaneous recognition or even recognition prior to official independence. As Kaplan and Katzenbach point out, competition with the Soviet Union was certainly a factor. Moreover, frequently no real consideration was given to the prospects of permanency of the new states, nor to the essential effectiveness of their regimes.

The recognition of governments raises significantly different issues. The state, already recognized, continues to exist as a state and the question is whether a particular regime is the government of that state. In the normal and routine cases of changes of government, no question or need of recognition arises. It is in cases of revolutionary change where there are at least two competing claimants that the issue becomes acute. While there might be said to be a presumption in favor of the established government, once there ensues a genuine civil war, the outcome of which is doubtful, then the attitude of other states towards the claimants becomes important. It is for this situation that the rules with respect to recognition of governments are designed.

As previously noted, during the civil struggle the rights and obligations of the state continue. The issue is which competing claimant represents that state for the purpose of continuity. In the case of new governments, the minimum international law requirement for recognition is that the regime is in effective control of the territory and population of the state, or, more controversially, controls a substantial part of the population and territory, and it is reasonably clear it will succeed in displacing the previous government. The latter alternative obviously raises delicate questions of judgment, and the possibilites of premature recognition are apparent. A state that recognizes a new regime on this minimum basis of effectiveness may be said to follow a *de facto* policy of recognition. The United States, however, does not accept this as the sole test and in theory requires, in addition, that the rebel regime give assurances that it will honor the obligations of the state under international law and applicable international agreements. In more modern times, particularly in the case of the Spanish Civil War, a practice was developed, especially by the United Kingdom, of abandoning an either/or approach and treating a revolutionary regime as the effective regime in part of the territory of a state. This is what the United Kingdom did with respect to the Franco forces prior to the conclusion of that civil war.

In earlier times various other additional conditions for recognition were advanced. During the monarchical era some attempts to insist on legitimacy of succession were made, but proved ineffectual. It is patent why this was so. It is the revolutionary change that raises the problem, and revolution is invariably illegal under the law of the state in question. But revolution is not illegal under international law. The international law system is not organized to police the internal relations of its members. In the *Tinoco Arbitration*,

Chief Justice Taft, as sole arbitrator, made this point explicitly. He also held in that case that, from the standpoint of an international tribunal, the test of effectiveness determines which government has capacity to bind the state.

Another reason occasionally invoked for denying recognition is objection to the inhumane methods employed by the rebel faction as distinguished from their illegitimate origin. Instances are Great Britain's attitude toward the French Revolution, and the attitude of the United States and others toward the initial seizure of power by the Soviets. But this, too, does not prove to be effective in an international system without power to deal with outrageous conduct by well-established regimes, to say nothing of revolutionary regimes. Only an effective world government will be able to exercise such a power, and present prospects for such a development are not encouraging.

Reference has already been made to the United States additional condition for recognition, namely, that the regime in question indicates its willingness to fulfill its obligations under international law and applicable international agreements. This policy was not originally followed. Jefferson stated in connection with the French Revolution that our policy was to recognize any government "which is formed by the will of the nation, substantially declared." Some have asserted that, except for the Wilsonian interlude to be mentioned later, this policy has been consistently followed. Lauterpacht refers to it as, in essence, a requirement of the consent of the governed in order to demonstrate that the regime will be effective with prospects of permanency. He further asserts that both the United States and the United Kingdom pursued this policy with fair consistency until the end of the first World War. Obviously, the test is far from precise and was variously interpreted in practice. In some instances it called for free elections, while in others popular consent was inferred on the basis of very inconclusive evidence indeed.

President Wilson added to the principle, especially in connection with Latin America, the further test of constitutionality under the law of the state in question. Moreover, the United States, although not a party, supported the Central-American Treaties of 1907 and 1923 in relation to the parties thereto. These treaties embodied a constitutional test and additional restrictions. Subsequently, in the Hoover administration, the constitutional test was abandoned, and we purported to revert to the Jeffersonian policy.

It can be said that, following World War I, the requirement of popular consent was gradually abandoned by both the United States and the United Kingdom in the face of the rise of dictatorial governments exercising effective power. This necessarily brief survey of varying attitudes of the United States should not suggest that any one test has necessarily been consistently applied in any period. This is certainly true at the present time. We would appear to have several policies. In Latin America we have developed a practice of informal consultation with the other members of the Organization of American States with respect to the recognition of *de facto* governments in that area. While the consultation is collective, the individual member state retains the power of ultimate decision. In the Resolution of the OAS embodying this procedure, it is interesting to note that stress is laid on free elections and willingness to honor international obligations as the principal criteria to be taken into account. On the other hand, in relation to the Communist bloc or blocs, our policy with respect to recognition of governments, just as in the case of new Communist states, has been governed by political considerations in the context of the "cold war."

Before proceeding to nonrecognition,

it might be useful to refer briefly to the modes, or methods, of recognition. The state or government seeking recognition obviously wants to interpret most favorably to itself any ambiguous statement or action of other governments that might imply recognition. On the other hand, the state contemplating recognition wishes to control the process. Since it is, more typically, smaller or weaker states, or the governments thereof, that are seeking recognition, it is the major nations that have insisted that recognition is a matter of intention and that any ambiguous act which might imply recognition may be negated by a disclaimer of intention to recognize.

Certain formal acts clearly constitute recognition, such as an exchange or reception of ambassadors, or the conclusion of a bilateral treaty. Appointment and reception of consuls, on the other hand, does not result in recognition although the request for and issuance of an exequatur probably does. In the case of multilateral treaties, it is, however, generally agreed that participating as a party thereto along with an unrecognized state or government does not constitute recognition. The same view prevails with respect to participating in international conferences with unrecognized regimes. Although there was some original difference of opinion with respect to membership in the League of Nations, especially when the allegedly recognizing state voted for admission, it came to be accepted, and is accepted in the United Nations, that admission to membership does not imply recognition on the part of other members that the entity in question is being recognized, apart from membership, as a state or government. The practical reasons for these last few conclusions are obvious. Any other view would paralyze the processes and institutions involved.

The caution of recognizing states, however, even in these areas, is illustrated by a recent example. The Nuclear Test-Ban Treaty provided that the United States, the United Kingdom, and the Soviet Union should each be a despositary and it was clearly understood that East Germany's deposit of its declaration of accession to the Treaty with the Soviet Union would have no effect on its continued nonrecognition by the other depositaries. The United States contention that East Germany would nonetheless be bound by their accession to the Treaty is more controversial.

If we accept intention as the decisive test, many informal relations with unrecognized regimes are possible, such as negotiations, temporary military agreements, and continuance of trade. Our various dealings with the Chinese Communist Government are a recent demonstration of this practice, and there are many other similar cases. This possibility of maintaining informal relations with unrecognized regimes makes more palatable and practical the policy of nonrecognition of states and governments which meet the criteria for those statuses. Despite a theoretical legal void, there is an expedient accommodation to the problem.

Turning to the phenomenon of nonrecognition of states and governments, what are the legal consequences in international and domestic law? Many of the important consequences are in domestic law, so that here we shall be considering "foreign relations law" as well as international law, strictly speaking. Accepting the declaratory theory as in accordance with the practice of states, we have states and governments which meet the criteria for recognition but are not recognized. What are the respective rights and duties between the existing entities and such unrecognized entities?

Referring to our previous discussion of informal relations, we see that some relations may and do take place between them. Speaking generally, the unrecognized entity, be it state or gov-

ernment, which has met the requisite criteria, has the rights of a state in international law, although it can be prevented from exercising them if the rights can only be exercised by a state, and the nonrecognizing state refuses to treat the purported exercise as the action of the government of the other alleged state. The same rationale controls with respect to the obligatons of such an entity. The questions mainly arise with respect to unrecognized governments rather than states. It is clear that the nonrecognition of a particular government does not deprive the state of its rights or relieve it of its duties under international law under the conditions stated. This is a consequence of the continuity of states.

The previous statements dealt with established rights and obligations. But an unrecognized regime meeting the necessary criteria can also create new rights and obligations with respect to a state that has not recognized it. In the Tinoco Arbitration previously mentioned, the effective government in Costa Rica (the Tinoco Government) was held to have bound that state in relation to Great Britain which has not recognized that government. As Chief Justice Taft pointed out in his opinion, the use of nonrecognition as a political weapon drastically reduces its value as evidence of the nonexistence of an effective regime.

Parenthetically, it should be mentioned that a recognized regime, even though no longer in control of some or all of its former territory, continues with its rights and obligations and may create new rights and obligations with nationals of another state still recognizing it, with respect to areas outside of the rebel regime's control. Thus, the public assets of a state with such a recognized regime, the assets being located within a state recognizing it, will be awarded by the courts of that recognizing state to the recognized government. This was the treatment accorded by the courts of the recognizing states to the assets, within those recognizing states, of the governments-in-exile during World War II. Furthermore, if a state has one regime which is being recognized as *de jure* and another as *de facto* at the same time by a recognizing state, the courts of that state will award the public funds to the *de jure* regime. Two British decisions concerned with the recognition of Ethiopian claims in England turned on this distinction, which demonstrates that, for domestic law at least, whether recognition is *de facto* or *de jure* makes a significant difference. The first decision held that the Emperor, as the ruler *de jure*, was entitled to collect a debt which had accrued before the recognition of the King of Italy as the ruler *de facto*. When England subsequently recognized the King of Italy as the ruler *de jure*, in the same case on appeal, it was held that the King was then entitled to collect the debt.

We have been discussing the rules relating to unrecognized regimes meeting the relevant criteria. What of the rights and obligations of unrecognized revolutionary regimes that do not meet the tests for an effective government either at the time of acting or subsequently? Such regimes do not have any general capacity to create rights and obligations in relation to another state, but international law does recognize a limited capacity to validate acts performed in territory within its control and relating to routine governmental administration rather than in support of its own quest for control of the state it purports to represent. An international arbitral decision to this effect held that the sale by such a regime of a postal money order was binding on the state and its successor recognized government.

Finally, what is the effect of subsequent recognition of a state or government that had previously met the requisite criteria? Recognition releases the restrictions that had previously existed

as to rights and obligations that had required acknowledgment thereof by the recognizing state. The further question of whether recognition is retroactive with respect to acts performed before recognition but after meeting the requisite criteria is not governed by international law. This follows from acceptance of the theory that there is no duty to recognize even when the requisite criteria exist. However, retroactivity is significant in the internal law of the recognizing state, and the scope of the principle will be developed in the subsequent discussion of the domestic legal consequences of recognition and nonrecognition.

Withdrawal of recognition is another matter which should be briefly canvassed. In theory, if a state or a government fails to maintain the requisite criteria, then withdrawal of recognition is appropriate. In practice, withdrawal normally occurs when a new state replaces the previously recognized state, or a new government is recognized in place of the preceding one. The presumption as to the existing authority applies here. Until a new state or government meets the requisite criteria, withdrawal of previous recognition would be inappropriate. Some authorities add, however, that withdrawal is appropriate if the initial recognition was tentative--i.e., *de facto*--and the requisite criteria have not materialized. The Restatement of Foreign Relations Law states that no instance of withdrawal of recognition has been found except in the situations above mentioned.

In theory, withdrawal should not be based on disapproval of a recognized regime, but only on failure to maintain the requisite criteria. In fact, states disapproving of a previously recognized regime do not withdraw recognition but sever diplomatic relations. For example, Great Britain recognized the Soviet Union *de facto* and subsequently *de jure* and a few years later severed diplomatic relations. Here, there is a legal curiosity. Severance of diplomatic relations does not present many of the problems thought to arise out of nonrecognition. In the *Sabbatino* case, the U.S. Supreme Court squarely held that the Castro Cuban Government, as a government that the United States had recognized, could sue in the courts of the United States, despite the severance of diplomatic relations prior to the litigation, even though the established rule is that an unrecognized government can not so sue.

As previously mentioned, some of the most significant legal consequences arising out of nonrecognition are governed by domestic or national law as distinguished from international law. In earlier reference to the recognizing state, it was assumed that, for international purposes, it was the executive branch of the government of that state that made the decision. In the domestic sense, the recognizing organ is a political branch of the government. The judicial branch is not involved. This does not mean that the executive's action is not subject to legal restraints. On the other hand, the judiciary has a significant role to play on the domestic scene, as distinguished from the international arena. The main problem for the domestic judiciary is what status should be granted to and what effect should be given to actions of an entity not recognized by their executive. The complex and extensive domestic law on this subject can only be summarized, and the discussion will be confined to the domestic law of the United States and the United Kingdom. In what follows it is assumed that the unrecognized entity has, in fact, met the requisite international criteria.

In the United Kingdom, as well as in the United States, an unrecognized government does not have access to the courts as a plaintiff. On the further question of whether an unrecognized government is entitled to immunity as a defendant, some decisions in the United

States have granted immunity, contrary to the British view. Our holdings can be explained on the ground that the state, as such, is entitled to claim immunity. A different result would be reached if there were also a recognized government in existence, which could waive the immunity on behalf of the state.

Most of the interesting questions involve the issue of what effect the courts should give to legislation and other action of an unrecognized government. The British decisions have drawn quite rigidly the logical deduction that no effect should be given in their courts to action of a regime unrecognized by the British Government. Thus, if the claimants in the *Tinoco* case had brought suit in a British court rather than in an international tribunal, the acts of the effective government in Costa Rica would not have been "recognized." Even Lauterpacht, who defends the British position, concedes that it is workable only so long as the executive branch accords recognition under his theory that there is a legal duty to recognize entities meeting the requisite criteria. The 14 years of nonrecognition of the Soviet Government by the United States tested this theory to the breaking point, and courts in the United States took a more flexible approach.

In a series of decisions in the New York Court of Appeals, under the principal aegis of Judge Cardozo, the view was developed that effect would not be given to the acts of the unrecognized Soviet regime unless not to do so would violate equity and justice. This has been called the "negative public policy" rule and is far from an exact juridical concept. Inspiration for it came from U.S. Supreme Court decisions with respect to the legal consequences of various acts that were performed within the Confederacy during the Civil War.

A recent New York decision in the *Mercury Business Machines* case is a good illustration of an even more flexible approach. An East German corporation, wholly owned and controlled by the unrecognized East German Government, sold typewriters to a New York corporation, an importer, which failed to honor the trade acceptance that it had given in payment upon receipt of the typewriters. An American citizen and resident of New York, who was an assignee for value of the East German corporation, sued the importer. The court held that he could recover on this private transaction even though the East German Government was not recognized by the United States. The sale and import of the typewriters was not forbidden by United States law. Under the circumstances, the court saw no policy objection to enforcement of the obligation. A different issue would arise out of a transaction originating in Communist China, trade with which is legally prohibited. A recent decision of the House of Lords in the *Zeiss* case, involving the effect of action taken by an East German entity in East Germany, is also of interest. That court held that the Soviet Union was the government recognized *de jure* in that territory by the British government, and that the action taken by the East German regime was in accordance with authority properly delegated by the Soviet Union, thereby avoiding the application of the traditionally rigid British view which would have given no effect to the action of an unrecognized regime.

The Restatement of Foreign Relations Law in Section 113 defines the scope of the United States exception to nonrecognition of the actions of an unrecognized regime as being confined to matters of an essentially private nature within the effective control of the unrecognized entity, *or* transfer of property localized at the time of transfer in the territory of the unrecognized entity and belonging then to a national thereof. This is a U.S. conflicts rule and not a rule of international law. In their commentary, they point out, as does the text of Section 42, that the so-called

"act of state" doctrine does not apply in the case of an unrecognized regime. Briefly stated, the act of state doctrine, another U.S. conflicts rule, provides that a U.S. court will not examine the validity of an act of a foreign state within its territory by which that state has exercised its jurisdiction to give effect to its public interests. In cases of foreign expropriation in violation of international law, this doctrine has been modified by congressional action in the context of the Castro expropriations of American property. By definition and practice, the act of state doctrine also does not usually apply to the extraterritorial effect of such acts, even if the regime is recognized. Thus, a foreign decree purporting to expropriate property within the United States would be treated as a nullity in our courts.

The previous discussion related to the effects given in U.S. courts to acts of an unrecognized entity meeting the necessary criteria. If recognition is subsequently granted, courts in the United States will then treat the acts of such a regime prior to recogniton as if they had been the acts of a recognized entity. Consequently, the act of state doctrine will then apply. This retroactive effect serves to validate previously unrecognized acts, mainly within the entity in question, as well as to validate the newly recognized regime's title to public funds in the recognizing state, as previously discussed. This doctrine of retroactivity does not extend, however, to the invalidation of prior transactions entered into by the then recognized government or obligations of private parties created by that government. The U.S. Supreme Court, in the *Guaranty Trust Bank* case, enforced this limitation on retroactivity by holding that the Soviet Government, suing after it had been recognized, was barred by the running of the New York statute of limitations prior to its recognition, since the then recognized Kerensky government could have sued the bank and failed to do so. The Guaranty Trust Bank was entitled to rely on the action or nonaction of the regime then recognized by the U.S. Government.

Only brief mention can be made of another important use of nonrecognition outside the area of states and governments as such. This is the doctrine of nonrecognition of illegal action, such as an illegal conquest of territory. When states act legally, there is normally no need to notify other states of the action taken or to receive their recognition of the legality of the action. However, when a state acts illegally, other states singly or collectively, can but need not declare that they will not recognize the illegal claim. Secretary of State Stimson invoked this doctrine with respect to Japanese action in Manchukuo, and the League of Nations passed a Resolution taking the same position. Of course, in the imperfectly organized world, frequently nothing effective is or can be done to reverse the illegal action. Nonrecognition is thus a weak sanction, serving to register moral and legal disapproval, and, legally, it serves to prevent the illegal actor from converting his illegal claim into a legal one through the passage of time without protest. This is a general principle equally applicable to any illegal claim although it is most prominently mentioned in connection with illegal conquest of territory. For example, the United States and other states protested the 200-mile territorial water claims of Chile, Ecuador, and Peru.

Up to this point we have discussed recognition in terms of the recognizing state as a decisionmaker in the decentralized international community. This was an accurate picture until the present era. We now reach the question whether the most universal international organization, the United Nations, should follow the same standards with respect to recognition as individual states have previously followed. In the past some writers have argued that collective

recognition by an international body would overcome the disadvantages of the national political element in the traditional process.

Whatever its theoretical advantages, it is clear that in practice recognition for purposes of membership and representation is divorced from whether a particular member state recognizes another member or its government outside the United Nations. The struggle over admitting the Communist Chinese Government to official participation in the United Nations produced a memorandum in 1950 by the Secretary General in which he stated that they were separate questions. He pointed out that traditional recognition practice was unilateral and discretionary, and that states have refused to accept a collective recognition procedure as a substitute for their own discretion. In the United Nations, however, decisions on membership and representation are collective. He therefore argued that, for United Nations purposes, the test should be which government was the one in the position to carry out the obligations of membership most effectively, rather than which government was recognized by the members outside the United Nations. In his opinion, acceptance of his argument would have led to the seating of the Communist Chinese Government. However, his view was rejected by a majority of the members and that government has not yet been successful in achieving representation in the United Nations. The Nationalist Chinese Government continues to represent the *state* of China, an original member.

What is the position of the divided states so far as membership in the United Nations is concerned? In January of 1957 the Soviet Union proposed that both Vietnams and both Koreas should be admitted, arguing that they were all states. The General Assembly rejected the proposal. The subsequent motion to elect South Vietnam and South Korea as members was vetoed by the Soviet Union in the Security Council. In 1966 East Germany applied for membership in the United Nations and, in its application suggested West Germany should be simultaneously elected. West Germany opposed the proposal, arguing that East Germany was not a state and that "it" violated human rights. No action was taken. The divided "states," therefore, continue to be excluded from membership in the United Nations.

What is the status of these four areas outside the United Nations? Here, of course, the basic division with respect to recognition is along bloc lines, as Kaplan and Katzenbach emphasize. A recent inquiry to the State Department on this question produced a reply in terms of diplomatic or lesser relations with a regime rather than in terms of recognition. As of June 1968, 64 nations were said to have diplomatic relations with Nationalist China as compared with 45 nations having diplomatic relations with Communist China, and 19 nations which did not have diplomatic relations with either government. The reply estimated that in January 1968 about 77 nations have diplomatic relations with South Korea and that 25 nations have diplomatic relations with North Korea. With respect to Vietnam, the response spoke in terms of representation *in* Saigon or *in* Hanoi, which is

BIOGRAPHIC SUMMARY

Professor Brunson MacChesney, Professor of Law at Northwestern University Law School, holds a B.A. from Yale University and a J.D. from the University of Michigan Law School. In 1955-1956 he occupied the Chair of International Law at the Naval War College and is the author of the "Blue Book" entitled *Recent Developments in the International Law of the Sea.*

not very helpful for our recognition question. On this basis, as of January 1967 about 30 nations are represented in Saigon and, as of an unspecified date, about 22 nations in Hanoi. This information on representation should be compared with a statement by Professor Moore of Virginia in a recent article in which he wrote that 60 nations have recognized South Vietnam and that 24 nations have recognized North Vietnam. Although he cites no specific source for these statistics, they appear to be more relevant and accurate for the purposes of our inquiry. Finally, the State Department reply states that West Germany has diplomatic relations with at least 70 countries and consular relations with 16 more, with 13 of which there may be also diplomatic relations. East Germany is reported as having full diplomatic relations with 16 countries and lesser relations with 18 other countries. No date is given for these German statistics.

This report on the status of the rival Chinese Governments and of the divided "states" both within and outside the United Nations concludes this necessarily broad survey of the legal aspects of recognition of states and governments in international law and, to some extent, in the internal law of states, especially in the "foreign relations" law of the United States. The scope of the lecture did not permit examination of every facet of the subject, nor exhaustive treatment of any particular segment that was included. It is hoped that this introductory analysis of many of the significant problems in this complex area will stimulate the student to formulate his own conclusions and will provide an adequate foundation for his further exploration of this challenging topic.

Ψ

The degree of criticism varies in direct proportion to the distance from the point of responsibility.

Brigadier General W.M. Fondren, USA:
At Quarry Heights, C.Z., 1962

A research paper prepared by
Commander Peter B. Walker, JAGC, U.S. Navy

INTRODUCTION

Although international law text writers, as well as the delegates to the conferences for the codification of international law, are in general agreement that foreign ships may pass freely through the territorial waters of a state, unanimity is lacking as to the specific rules which apply. For example, in May and June 1967, a major issue in the Arab-Israeli war was the matter of innocent passage of Israeli and Israeli-bound ships through the Gulf of Aqaba. In August 1967 the Soviet Union denied the right of innocent passage through the Vilkitsky Straits to two U.S. Coast Guard icebreakers.

It is the purpose of this paper to explore the origins, status, and recent developments in the international law of innocent passage of ships through the territorial seas of foreign countries. It is a timely subject, as the two incidents cited above attest. In view of the modern trend among many countries in the world to claim increasingly wide territorial seas, innocent passage is taking on growing importance in the maritime intercourse of nations. With the background of the current international law of innocent passage established, this paper will then analyze the conflicting national claims in the Gulf of Aqaba and Vilkitsky Straits incidents to determine whether the current concepts re-

main valid or whether new usage is developing, which usage may in time be accepted as customary international law.

I--FREEDOM OF THE SEAS

The concept that the seas should be open to the free use of all peoples is hardly a new one. From ancient Roman times on, such an idea has been proclaimed. Practice, however, has varied considerably from the theory, and for the last 400 years mankind has been attempting to reconcile the competing interests of states into a workable set of customs and rules.

The Middle Ages saw the development of the laws of Oleron and the *Consolato del Mare.* Although these codes restated the commonality of rights under a law of the sea, individual states adopted a position that continual use gave them rights over particular sea areas. Thus the Adriatic was claimed by Venice, the Ligurian Sea by Genoa, and the four surrounding seas by England.

The problem of sovereignty over the seas, however, did not arise until 1455 when Pope Nicholas V granted Portugal exclusive rights of navigation, fishing, and trading in the African waters beyond Capes Boyador and Non. On Columbus' return from his first New World voyage, the Portuguese king maintained that his discovery was in Portuguese waters. Ferdinand and Isabella appealed to Pope Alexander VI, who granted to Spain rights in western oceans similar to those already held by Portugal. While the papal division of the world's oceans between Spain and Portugal was disputed, those two nations finally agreed that the dividing line should be 340 leagues west of the Cape Verde Islands and should circle the globe.

It appears that this partition went unchallenged by most European countries, with the noteworthy exception of France whose Francis I championed the free use of the seas for French mariners.

Maritime practices during the 16th century ranged from exploration and trade--with the claims of competing countries to exclusive enjoyment of portions of the seas sometimes observed--to outright piracy. Elizabeth I of England ordained that "The use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard to the public use permitteth any possession thereof."[1] Having the greater maritime power to bring to bear, England's use of the seas was more readily enforceable than France's. Drake's Caribbean victories in 1586 effectively terminated Spanish hopes for an exclusive use of western seas, although Spain did cling to her claims to exclusive trade rights with her colonies and exclusive navigation of colonial waters. Although England and France attempted by treaty to acquire trade concessions, they never did acknowledge that Spain had the power to bar ships of other nations from American waters.[2]

Simultaneous with England's termination of Spanish exclusivity in western oceans, the Netherlands was attempting to destroy Portugal's monopoly in the east. In support of Dutch claims to trade in the East Indies, Hugo Grotius, in 1605, wrote a learned treatise on the law of prize. One chapter was published separately under the title *Mare Liberum* in 1609. In this brief work Grotius made the first formal statement of freedom of the seas as a general principle of international law.[3] Grotius' basic premise was that "every nation is free to travel to every other nation, and to trade with it," which he amplified with the observation, "nature has made neither sun nor air nor waves private property; they are public gifts . . . the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all. . . ."[4]

These views were soon contested by the British who claimed and enforced exclusive fishing rights in "British Seas." Supporting such claims were jurists William Welwood and John Selden. Welwood saw the intimacy of the land with its adjacent sea as requiring national retention of the sea and its use for the benefit of the people. Selden amplified on Welwood's work and validly noted that nothing in the nature of the seas prevented either their appropriation or claims to sovereign rights therein.[5] Thus is presented the origin of a conflict in the interests of nations which exists to this day: the interests in the free use of the world's oceans which all nations share versus the individual interest of a state in protecting its security as well as economic marine resources by exercising sovereignty and, thereby, exclusive control over a belt of water adjacent to its shores.

An accommodation between such competing positions was attempted in 1702 by Cornelius van Bynkershoek, a judge of the Supreme Court of Appeal of Holland, who asserted that "the dominion of the land ends where the power of arms ends," or, "so far as cannon balls are projected."[6] The cannon shot distance was specified at one sea league by Galiani, an Italian jurist, in 1782. The following year Secretary of State Jefferson noted in diplomatic correspondence that the limit which had gained recognition among nations was the *maximum* range of a cannon ball. Thereafter the United States recognized the sea league, or "three geographical miles" as the extent of its territorial sea. Such limit was also recognized by Great Britain, although her early 19th century "hovering acts" (which authorized her to arrest ships outside her territorial waters, on the high seas, on suspicion of smuggling) ran counter to such position. By the late 19th century the hovering acts had been done away with, and Britain unqualifiedly accepted the 3-mile limit of her territorial sovereignty in the marginal sea.[7]

From the time of Grotius into the present century, the free use of the seas by ships of all countries has developed into an internationally accepted legal principle. Concomitant with that principle, and developing as a matter of customary practice, is the right of ships to pass through the territorial waters of foreign countries without interference by, or subjection to the jurisdiction of, the littoral state. Although the concept of innocent passage is universally accepted as an abstract principle, the practice of states has not been uniform, and disagreements exist today on its implementation.

Efforts to codify international law began in the 19th century in various fields, but it was not until the 1920's, under the direction of the League of Nations, that an effort was made to codify the Law of the Sea in time of peace. The Conference for the Codification of International Law, held at The Hague in 1930, culminated several years of scholarly preparation. Although a reasonable degree of agreement was reached on other matters, including innocent passage, adoption of a convention failed because the delegates were unable to agree on an internationally acceptable width of the nations' territorial seas.[8]

The 1958 Geneva Conference on the Law of the Sea, however, profiting from the experience of the 1930 Codification Conference, did reach sufficient accord to adopt four conventions, including a Convention on the Territorial Sea and Contiguous Zone. It still failed to reach agreement on a standard width for the territorial sea, as did its successor conference in 1960.

From these international conferences for the codification of international law one particular trend is apparent: a growing number of nations are claiming territorial waters greater in breadth than 3 miles. A U.S. proposal at the 1960 Hague Conference which would have

established a 6-mile limit to territorial waters with an additional 6-mile contiguous zone for enforcement of fishing and other laws failed of adoption by one vote.[9] Most of the new, so-called "emerging nations" have proclaimed their territorial waters to be 12 miles wide.[10]

How does this affect the maritime nations of the world? Cannot their ships still transit territorial waters of foreign nations in innocent passage? As will be demonstrated in later chapters, a nation may deny innocent passage to foreign ships under certain circumstances. The maritime nations, and especially their shipowners and shippers of cargo, would prefer to sail entirely on the high seas where ships have an absolute right of passage than to rely on innocent passage through territorial waters where the littoral state may, they fear, act capriciously in denying innocent passage. With many nations now claiming territorial waters out to a limit of 12 miles (or more), the area of the high seas available to such unrestricted, unqualified passage--near the shelter and navigational reference points of land--has been significantly reduced. It is for this reason that the attributes of innocent passage have become increasingly important to the maritime world.

II--NATURE AND ATTRIBUTES OF INNOCENT PASSAGE

The nature of innocent passage (absolute or qualified right) is dependent upon the legal status of the waters which border the maritime states. Historically, there has been disagreement on such matters. Relying on the Roman and Grotian concepts that the seas are incapable of appropriation by anyone or any nation, one school postulated that all of the oceans constitute the high seas and that the littoral states had only limited claims in their marginal waters. The opposing school held that the marginal waters were as much property of the littoral states as their land territory, fully subject to their sovereignty (i.e., exclusive power to control and regulate).[1] International law developments of the 20th century, however, have resolved such conflict. The discussions at the 1930 Codification Conference, the work of the International Law Commission preparatory to the 1958 Geneva Conference on the Law of the Sea, as well as the latter Conference itself, produced a statement expressive of customary international law,[2] which is embodied in article 1 of the Convention on the Territorial Sea and the Contiguous Zone: "Article 1. 1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea. 2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law."[3]

It is thus apparent that the sovereign rights of a coastal state in its marginal waters are not absolute. They are subject to limitations imposed by the community of nations by means of international law. One of these is innocent passage, which can be characterized as a qualification of the coastal state's jurisdiction and sovereignty in its territorial waters. Although the draft articles ("Harvard Research") presented to the 1930 Codification Conference did not characterize innocent passage as a right, the accompanying commentary did,[4] and the draft articles produced by the Conference specified innocent passage as a right.[5] The 1958 Conference made clear in its discussions and in the Convention on the Territorial Sea and Contiguous Zone that it was indeed a *right* enjoyed by ships. Articles 14 through 23 in section III of the 1958 Convention represented the agreement of the 1958 Conference as to the criteria of innocent passage.

To determine the specific legal attributes of innocent passage, the balance of this chapter will examine the provi-

sions of the 1958 Convention and the legislative intent behind them. While this Convention may be considered as a recent authoritative statement of international law, some shortcomings must be borne in mind. The provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone do not necessarily restate customary international law. Neither the International Law Commission, which drafted a proposed convention, nor the Conference attempted a mere restatement of existing custom, but rather undertook to codify a set of realistic rules for the regulation of international intercourse in the territorial seas and the contiguous zone. The Convention does, of course, embody some rules of customary international law, and to the extent that it does it is binding upon all states whether they be parties to the Convention or not. Those provisions which do not represent prior international law are binding only upon the parties to the Convention (until those provisions receive such general acceptance among the states of the world as to achieve the status of customary international law).

Another shortcoming of the Convention is that it fails to cover several situations of importance such as the width of the territorial sea, whether warships have an unlimited right of innocent passage, and a provision specifically applying to multinational bays such as the Gulf of Aqaba.

Rights of Ships. Basically, ships of all states may exercise the right of innocent passage through the territorial seas of foreign states. Such a provision was included in the International Law Commission's draft articles which were submitted to the Conference for consideration. The original proposal was adopted as article 14, paragraph 1, with only one change.[6] The words "whether coastal or not" were added to describe further "all states."[7] This action emphasized that innocent passage was a right accorded to ships, rather than one which depended upon the reciprocity between coastal states.

In the debates of the Conference, concern arose over the transit of fishing boats and warships in innocent passage. In question was not whether such vessels had the right of innocent passage, but rather the conditions surrounding such passage and the restrictions which the coastal state might place on it.

Having stated the general principle of the right of innocent passage, the Convention goes on to define "passage" in article 14, paragraph 2, as "navigation *through* the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." [Emphasis added.] Such action rejects an earlier view that the aims of a foreign vessel transiting the territorial sea for the purpose of entering internal waters are inconsistant with the basis of the right of innocent passage because, it was argued, the status of that vessel was deemed assimilated to that of a ship in port where the jurisdiction of the coastal state is subject to no restriction.[8]

The extension of innocent passage to a ship transiting the territorial sea after leaving internal waters is indicative of development in international law. Although the Harvard Research in International Law, which drafted articles of the law of the sea for presentation to the 1930 Hague Codification Conference, had rejected the concept that vessels entering or leaving a port of the coastal state could be in innocent passage,[9] the Codification Conference finally adopted the same provision as the 1958 Conference.[10]

Thus the basic criterion for innocent passage is movement, and to this extent article 14(2) reflects customary international law.[11] The delegates to the Conference were in agreement with the long-established principles that anchor-

ing or "hovering" in the territorial sea broke innocent passage and subjected a ship to the jurisdiction of the coastal state.[12] A specific provision to that effect was introduced in the Conference but was rejected as unnecessary. The exception to the rule that stopping and anchoring, except as incidental to ordinary navigation, will break innocent passage is that of *force majeure*, as embodied in article 14, paragraph 3.[13] The humanitarian principle that a ship in distress from a *force majeure* may enter foreign territorial waters and anchor or may put into port with complete immunity from local jurisdiction has been long recognized in international law.[14]

The most extended discussions at the Conference related to the problem which is basic to all considerations of innocent passage in its relationship to freedom of the seas: the proper balance between the security interests of the coastal state and the overseas states' need to navigate through territorial seas without undue impediment. Such debates centered around the Convention provisions which defined "innocent" and those which spelled out the rights and duties of the coastal states.

Article 14, paragraph 4, first sentence, provides the basic definition: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." The article which the International Law Commission originally proposed had read: "Passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules or to other rules of international law."[15] The proposed amendments to this original provision as well as the ensuing debates are enlightening as to the legislative intent behind the adopted provision.

An amendment proposed by India would have added the words "peace, good order or" prior to "the security," since coastal states had greater interests than merely security, which the United States characterized as comprehending only military security.[16] Such additional interests include control of imports, exports, customs and immigration, navigation, and crime.

Romania introduced an amendment which, had it been adopted, would have provided that "Passage is innocent as long as it is for the *normal* course of the ship . . . ." [emphasis supplied], expressing the view that departure from such a course was sufficient reason for the coastal state to exercise control. Of particular concern to Romania was the preservation of economic (fishing) interests against the "practice of some fishing vessels of putting nets down illegally while traversing the territorial sea."[17] Against this proposal the argument was raised by several countries that there was no such thing as a "normal" course for a ship, since its exact course was determined by variable factors, including weather, loading conditions, and destination.

The United Kingdom expressed what appeared to be the majority view, that the test of innocence of passage was not the passage itself, but rather the manner in which that passage was carried out. The debates centered on whether particular proposed language adequately conveyed this idea or, instead, permitted the coastal state to claim arbitrarily that the *fact* of passage was prejudicial to its interests. The Chilean delegate's view was that the language finally adopted created a presumption of innocence.[18] In any event, the determination of such issue initially rests with the coastal state. It is in the best position to judge the question of prejudice to *its* "peace, good order and security." Safeguards against a capricious claim include the reciprocal action that other coastal states may take as well as world public opinion.

The second sentence of article 14, paragraph 4, provides that "[innocent]

passage shall take place in conformity with these articles and with other rules of international law." The reason for the split of the International Law Commission's originally proposed single sentence into two separate sentences was to deal with two separate issues: the conditions which had to be fulfilled for innocent passage; and the extent of jurisdiction of the coastal state. A further assurance was desired that a violation of a rule of international law (such as the requirement for smokeless fuel) which did not prejudice the security of the coastal state could not be made the ground for denial of innocent passage.[19] Therefore, the innocence of passage is not determined by the ship's compliance with *all* applicable provisions of international law.

A further concern of the Conference was to insure that fishing boats be permitted innocent passage, but that the coastal state be empowered to prohibit fishing by a ship purporting to pass innocently through the territorial sea. Proposals for a specific paragraph covering fishing vessels were offered. One which would have required that fishing gear be "stowed away" was criticized as placing a burden on fishing vessels which was not required by all countries.[20] Further, "stowed away" is ambiguous in that it does not specify where or how gear is to be stowed, and a ship may not have time, before entering territorial waters, to do more than bring its gear aboard.

The United States and United Kingdom felt that a specific provision on fishing vessels was superfluous, since a ship illegally fishing in territorial waters could not be in innocent passage. The provision adopted article 14, paragraph 5, conditions the innocence of passage of fishing vessels upon their observance of "such laws as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea."

The final paragraph of article 14 was an embodiment of the prevailing views on submarines, as reflected in the 1930 Codification Conference: in order to be in innocent passage, "submarines are required to navigate on the surface and to show their flag."[21] In such manner, submarines can give evidence of the innocence of passage and not constitute a danger to other ships in the territorial sea by proceeding beneath the surface where they cannot readily be seen. It is significant to note the position of this paragraph among the "Rules Applicable To All Ships," so that all submarines, both civilian and warships, are included.

Duties of Ships. Where rights exist in favor of a party, there exist also commensurate duties, and innocent passage is no exception. Article 17 restates preexisting international law in requiring ships in innocent passage to comply with the laws and regulations enacted by the coastal state.[22] The balancing of interests between ship and coastal state is found in the provision that "the laws and regulations enacted by the coastal state [be] in conformity with these articles and other rules of international law." Thus this article would not recognize a duty on ships in innocent passage to comply with a law which denied innocent passage in contravention of international law. Lest coastal states be tempted to require, by law or regulation, levies of duties to be paid by ships in innocent passage, article 18, paragraph 1, specifies that "no charge may be levied upon foreign ships by reason only of their passage through the territorial sea." Paragraph 2 recognizes the inherent right of a coastal state to make charge, without discrimination, for services actually rendered (such as pilotage, towing, et cetera).

Rights of States. The rights of coastal states with respect to ships in innocent passage are set forth in article 16 of the Convention.[23] The first two paragraphs, which recognize a state's power to "take the necessary steps in its territorial sea

to prevent passage which is not innocent" and to deal with ships proceeding to internal waters did not engender controversy at the conference.

Paragraphs 3 and 4, however, revealed differences of opinion of what the law should be with respect to a state's suspension of innocent passage in territorial waters, generally, and in straits, in particular.

The principal international legal precedent for discussion of these points is the decision of the International Court of Justice in the Corfu Channel case.[24] The facts of the controversy were as follows: on 22 October 1946, the British destroyers *Saumarez* and *Volage*, in company with two cruisers, left the port of Corfu and proceeded northward through a channel in the North Corfu Strait. *Saumarez* struck a mine, sustaining heavy damage and personnel casualties. While assisting *Saumarez*, *Volage* likewise struck a mine. On 13 November 1946 the British found a moored minefield in Albanian territorial waters, where its two ships had been damaged, and swept it. Earlier, in May 1946, two British cruisers had traversed the strait, and Albanian guns had fired upon them.

The legal issues presented were whether warships could transit the strait lying in Albanian territorial waters in innocent passage without the permission of Albania, whether the fact of their passage prejudiced Albania's security, what duties were incumbent upon Albania to give notice of the navigational hazard (although Albania disclaimed any knowledge of the mining or perpetrator thereof, the Court found constructive knowledge), and whether the United Kingdom violated Albania's sovereignty by resorting to self-help in clearing the minefield without Albania's permission.

Albania contended that the North Corfu Channel did not belong to the class of international maritime channels through which a right of passage existed, since it was a route of secondary importance and not even a necessary route between two portions of the high seas.

The Court held that the determinative factor was the strait's geographical situation as connecting two portions of the high seas and the fact of its use for international navigation. It specifically rejected the contention that the strait must be a necessary route between two portions of the high seas to establish an international right of passage. After noting the considerable use which had been made of the channel, the court decided that the "North Corfu Channel should be considered as falling under the category of international maritime thoroughfares, through which passage cannot be prohibited in time of peace by a coastal state."[25]

Albania contended further that the destroyers' passage on 22 October 1946 was not innocent and therefore violated Albanian sovereignty. In support Albania argued, *inter alia*, that the passage took place not for ordinary navigation but in a political mission. Evidence from the United Kingdom had showed that one of the purposes of the passage was to test Albania's attitude (Albania had fired on passing British warships on 15 May 1946); ensuing diplomatic correspondence had revealed Albania's view that warships might not transit her territorial sea without prior notification. The Court therefore analyzed the manner in which the passage was performed. The ships' guns had been placed in their normal stowage position. Personnel, however, were at action stations. Finding that the latter precaution was reasonable, the Court held that the United Kingdom did not violate Albania's sovereignty by sending her ships through Albanian territorial waters on 22 October 1946.[26]

The Court found, however, that the United Kingdom's "self-help" of sweeping the minefield on 13 November 1946 against the expressed will of the Albanian Government could not be justified.

This show of force by a number of warships, which remained in Albanian territorial waters for some time, could not constitute innocent passage and therefore violated Albanian sovereignty. No payment of damages was required of the United Kingdom, however.

Conversely, the Court found Albania liable in damages to the United Kingdom for breach of its coastal state's duty to warn of a known navigational hazard.

The Court held that warships might enjoy the right of innocent passage without first obtaining permission from the coastal state. Thus the two passages of British warships, in May and October 1946, were innocent inasmuch as the ships were navigating through the strait without prejudicing Albania's security. The British warships' actions of remaining within Albanian waters while sweeping mines in November 1946 were prejudicial to Albania, hence there was no innocent passage.

A further holding was that Albania could not restrict passage through a strait connecting two portions of the high seas.

Thus the Conference had before it a judicial decision which it might confirm by codification or overrule by failing so to do. It chose to codify the decision, in part, in article 16, paragraph 4, which prohibits "suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas. . . ."

The draft proposal of the International Law Commission would have limited the prohibition on suspending innocent passage to "straits normally used for international navigation between two parts of the high seas." The Commission commented that inclusion of the word "normally" reflected the thrust of the ICJ decision in the Corfu Channel case.[27] The Conference, however, did not so read the Corfu Channel decision and rejected such wording. The Netherlands representative explained that "normally" had been dropped because it was considered that "paragraph 4 should apply to sea-lanes actually used by international navigation."[28] The Conference's other change was to expand on the Corfu Channel case and to extend the prohibition on suspending innocent passage through straits to those connecting the high seas and the territorial waters of another state. The explanation given was that this "reflected existing usage safeguarding the right to use straits linking the high seas with the territorial sea of a State."[29]

Saudi Arabia strongly dissented to deletion of the word "normally," maintaining that "innocent passage could be exercised only in recognized international seaways; it could not . . . be invoked by ships using the North-West Passage, which had never been used for regular international navigation."[30]

Saudi Arabia further contested the proposition that international law provided a right of innocent passage through straits connecting the high seas with an internal sea or the territorial sea of a particular state, citing the Corfu Channel case for support.[31] The weakness of such argument is that the Court was only dealing with a strait linking two portions of the high seas, therefore had no need to face the further question of straits connecting high seas with territorial seas. The Saudi Arabian delegate concluded: " . . . the amended text no longer dealt with general principles of international law, but had been carefully tailored to promote the claims of one State."[32] When article 16 came up for discussion later in plenary session, the United Arab Republic delegate attempted unsuccessfully to obtain a vote on article 16, paragraph 4, separately, in an effort to reinstate the International Law Commission's original draft wording. Such effort was concurred in by the Saudi Arabian delegate, who reiterated his charge that "paragraph 4 had been drafted with one particular case in

view."[33] He obviously was referring to the Israeli claim of innocent passage through the Straits of Tiran and Gulf of Aqaba.

Notwithstanding the Arab challenge, paragraph 4 of article 16 was adopted in the First Committee by a close vote, 31 to 30, with 10 abstentions. Voting against were the Arab countries of North Africa and the Middle East, as well as Communist bloc countries. In plenary session, article 16, as a whole, was adopted by a 62 to 1 vote, with 9 abstentions.[34]

With regard to paragraph 3 of article 16 (suspension of innocent passage in territorial waters), there was a disagreement over the word "temporarily." Romania introduced a proposal to delete it; the effect would thus have been to give the coastal state latitude in denying innocent passage through its territorial waters without any time constraint. This proposal was not put to a vote; "temporarily" therefore remained.[35]

The International Law Commission draft of article 16, paragraph 3, was extensively reworded, but such changes merely constituted improvements in the wording and did not make any changes of substance. As adopted, it provides for the temporary suspension of innocent passage by the coastal state in the territorial sea if such action is "essential for the protection of its security." In the First Committee the United Kingdom delegates noted the desirability of wording this provision in such a way as to create an "objective" standard for the determination of prejudice to the security of the coastal state. In reply, the Indian delegate noted that security questions should be determined by the coastal state, since it is in the best position to have access to and to evaluate the relevant evidence. This view prevailed, and although there was some further disagreement on the question of which wording best accommodated the interests of coastal states and international shipping, the present wording of article 16, paragraph 3, was adopted by the First Committee by a vote of 31 to 27, with 5 abstentions.[36]

Thus it can be seen that article 16, while stating the rights of coastal states to protect their security interests with respect to innocent passage, does limit such rights: innocent passage cannot be suspended through straits connecting the high seas with either the high seas or the territorial waters of a foreign state; in other territorial waters, it may only be temporarily suspended in specified areas, and due publication of such fact must be made.

Duties of States. The legislative effort of the Conference regarding the duties of the coastal states served to limit their liability. The International Law Commission's draft proposal, which represented an effort to codify a novel area of international law, would have required the coastal states to "ensure respect for innocent passage through the territorial sea and . . . not allow the said sea to be used for acts contrary to the rights of other states."[37] This provision was seen as placing the coastal state under a duty to police its territorial waters so that one foreign state might not impinge upon the rights of another, and to remove obstacles to innocent passage. The International Law Commission believed that that provision reflected the International Court of Justice ruling in the Corfu Channel case, but such view was contested by the United States as *obiter dictum* and not intended to state a codifiable rule of law.[38]

Fearing an absolute liability which could impose an undue economic burden on coastal states, the United States proposed deletion of this provision. The U.S. proposal was adopted,[39] and the first paragraph of article 15, dealing with duties of coastal states, reads simply: "The coastal State must not hamper innocent passage through the territorial sea."

The second paragraph of article 15, as proposed by the International Law Commission reads, "The coastal State is required to give due publicity to any danger to navigation of which it has knowledge." The Conference feared that this requirement, as well, was too broad and imposed the duty on coastal states to give notice of dangers no matter where they be located. Such a burden was deemed inordinate and the limitation "within its territorial sea" was added.[40]

The Conference thus incorporated the thrust of the Corfu Channel decision into the Convention, as the International Court of Justice had in large measure predicated the Albanian liability on the failure to give appropriate publicity to a known danger to navigation within its territorial waters.

Article 18, which prohibits coastal states from levying charges on ships in innocent passage except for services actually rendered, is identical to the article drafted by the Second Committee at the 1930 Codification Conference.[41] It acknowledges the economic value of the right of innocent passage to the commercial ships of the world and emphasizes again the policy that coastal states not interfere with passing ships.

Warships. May warships enjoy the right of innocent passage in time of peace? Is such right dependent on either prior notification to, or the permission of, the coastal state? No other aspect of innocent passage is more controversial. One view is that warships should "not enjoy an absolute legal right to pass through a state's territorial waters any more than an army may cross the land territory." The rationale behind this view is that foreign warships by their very nature pose a threat whereas merchant ships do not, and that the world interests which exist in the case of freedom of the seas for merchant ships are absent in the case of passage of warships.[42]

The opposing view, espoused by the United States and less than a majority of the states represented at the Conference, is that warships do have a right of innocent passage, as was held in the Corfu Channel case.

The 1930 Codification Conference draft proposals on warships reflected the more liberal view;[43] the International Law Commission, however, proposed an article which would have made the passage of warships "subject to previous notification or authorization," and the First Committee reported such a provision.[44] The words "or authorization" were deleted from the article by separate vote, with the U.S.S.R. voting to retain them on the basis that every state, in the exercise of its sovereignty, should be able to require prior authorization of foreign warships.[45] Saudi Arabia voted to retain the requirement for prior authorization of warship passage, noting that "a warship could not be regarded as a vehicle of peaceful communication, and unauthorized passage was tantamount to violation of the rights of coastal states and to aggression against them." The proposed article 24, as amended to require only prior notification for the innocent passage of warships, failed of adoption (43 for, 24 against, 12 abstentions) because it did not receive the requisite two-thirds majority. The "no" votes included the Communist bloc and Arab countries, which had so vociferously supported the requirement for prior authorization. Thus the Convention contains no provision according states the right of innocent passage for their warships.

(Article 23, originally article 25 of the International Law Commission's draft convention, is the only rule applicable specifically to warships. It requires warships to comply with the regulations of the coastal state. For failure of compliance with such regulations and the coastal state's request for compliance, the warships may be

ordered to leave the territorial sea. This provision was adopted by a 76-0-1 vote.)

However, the International Court of Justice based its Corfu Channel case holding that warships do enjoy a right of innocent passage, without the necessity for either prior notification to or authorization from the coastal state, upon evidence that such was the general practice of states.[46] Notwithstanding the failure of the 1958 Law of the Sea Conference to include prior notification or permission as a prerequisite to the innocent passage of warships, a considerable number of states favor such a rule. Included in this group are the Soviet bloc and Arab states, as demonstrated by the vote on the International Law Commission's proposed article 24 and the reservations lodged by several states at the time of signing the Convention.[47]

Accordingly, it would appear that the present attitude of a majority of states accepts a right of innocent passage for warships--but only if it be subject to a greater measure of regulation than is the case with nonwarships.

Coastal State Sovereignty, Flag State Jurisdiction, and Ship Immunity. Like the 1930 Codification Conference, the International Law Commission in its draft articles 20 and 21 (criminal and civil jurisdiction) sought not to promulgate specific rules resolving the conflict between the inherent jurisdiction of the coastal state over its territorial waters and the jurisdiction of the flag state over its ships while they transit foreign territorial waters. Instead, established principles were set forth for guidance: that the coastal state would, as a general rule, refrain from exercising criminal jurisdiction over a passing ship unless the impact of the crime affected the coastal state or disturbed its peace, order, and tranquility, or unless its assistance was requested by the ship captain or consul of the flag country. A new provision was included for the suppression of drug traffic. These rules recognized, however, the power of the coastal state to exercise its jurisdiction and in no way restricted it. The same philosophy applied to the exercise of civil jurisdiction: the coastal state *should not* (but still may) stop or arrest foreign ships except insofar as civil obligations attach to the *current* voyage, or in the case of a ship leaving internal waters or lying in the territorial sea (article 20).

Government civilian vessels in commercial service are assimilated to the status of merchant vessels by article 21; Government civilian vessels not operated for commercial purposes are governed by the provision of articles 14 through 19 but are not subject to the civil jurisdiction of article 20 (articles 21, 22).

In sum, the 1958 Convention recognizes the jurisdiction of the littoral sovereign over vessels in his territorial sea and, consistent with an accommodation between that sovereign's power and the free use of the seas, does not forbid the littoral state to exercise jurisdiction, but merely exhorts him not to do so--in accordance with the stated guidelines.

Innocent Passage in Time of War. The 1958 Convention fails to state whether it is applicable in both war and peace. The International Law Commission's commentary on its draft Convention on the Law of the Sea stated that the draft articles it developed were to apply only in time of peace.[48] Although there was some discussion at the Conference to the effect that the articles considered had only peacetime application, the Convention on the Territorial Sea and Contiguous Zone is silent on this point.

It should be noted, however, that article 10 of Hague Convention XIII of 1907, concerning the rights and duties of neutral powers in time of war, recognizes that a right of passage of

belligerent warships through a neutral's territorial waters exists.[49] Although such passage is not qualified with the adjective "innocent," the construction placed upon "mere passage" indicates that it is intended to apply as "innocent passage."

The *Altmark* incident in World War II illustrates the problems and some practice with regard to innocent passage in time of war.[50]

In 1940 the *Altmark*, a German naval auxiliary, was returning to Germany from the South Atlantic with about 300 British prisoners of war. She took a circuitous route which brought her within Norwegian territorial waters for a distance of several hundred miles. The *Altmark* was hailed by a Norwegian torpedo boat and in reply to inquiry stated that it had no citizens or members of armed forces of any belligerent aboard. Subsequently, still within Norwegian waters, a British destroyer boarded the *Altmark* and liberated the prisoners. Norway protested the infringement of her sovereignty and violation of her neutrality.

This situation presented the issues of whether a belligerent warship enjoys a right of innocent passage through neutral waters and, if so, whether such passage is subject to any restrictions. In exchanges of diplomatic correspondence,[51] Britain contended that the *Altmark* was making belligerent use of Norway's territorial waters and therefore could not have been in "mere passage" and that Norway had a duty to ascertain whether the *Altmark's* passage constituted belligerent activity in violation of Norway's neutrality. Norway had respected the immunity enjoyed by the foreign warship and took no action to impede its passage beyond verifying its character as a warship.

Britain conceded that "mere passage" in article 10 of Hague Convention XIII denoted innocent passage but construed the distance and duration involved in *Altmark's* passage as defeating its innocence, inasmuch as this Convention prohibits belligerents from engaging in military operations in neutral territorial waters. Britain contended that the result of *Altmark's* choice of route was to obtain a shield against attack by virtue of Norway's neutrality.

Notwithstanding the different inferences drawn by Britain and Norway from the factual situation presented by the *Altmark's* passage, both agreed that customary international law permitted a belligerent warship to navigate in innocent passage through neutral territorial waters.[52] Despite the provisions of article 12 of Hague Convention XIII,[53] neither Britain nor Norway regarded the fact that *Altmark's* passage through territorial waters exceeded 24 hours as a violation of the Convention but rather as evidence bearing on the innocence of the passage.

Since learned writers on international law accord to the coastal neutral state the right to deny innocent passage in its territorial waters to all belligerents without discrimination if it so chooses, and Hague Convention XIII is inexplicit, it appears that belligerent warships enjoy only a conditional right of innocent passage.[54] The position of the U.S. Navy on this matter appears in article 443 of the *Law of Naval Warfare:* "a. Passage Through Territorial Sea. A neutral state may allow the mere passage of warships, or prizes, of belligerents through its territorial sea."[55] The amplifying footnote to this provision reads, in part:

> . . . Thus, the 'mere passage' that may be granted to belligerent warships through neutral territorial waters must be of an innocent nature, in the sense that it must be incidental to the normal requirements of navigation and not intended in any way to turn neutral waters into a base of operations. In particular, the prolonged use of neutral waters by a belligerent warship either for the purpose of avoiding combat with the enemy or for the purpose of evading capture, would appear to fall within the prohibition

against using neutral waters as a base of operations.[56]

With respect to the passage rights of belligerents *inter se*, a belligerent is entitled, as a matter of customary international law, to prevent the passage of an opposing belligerent's ships or of cargo destined for him.[57]

III--RECENT INCIDENTS INVOLVING INNOCENT PASSAGE

With the recent legal history of innocent passage thus set forth, this chapter will undertake an analysis of the two 1967 events of international significance in which the issue of the practical application of the foregoing rules and principles arose: the United Arab Republic's denial of innocent passage to Israeli shipping through the Straits of Tiran and Gulf of Aqaba, which proved to be a *casus belli* for the ensuing war, and the Union of Soviet Socialist Republic's denial of innocent passage through the Vilkitsky Straits to two U.S. Coast Guard icebreakers.

Straits of Tiran and Gulf of Aqaba. On 22 May 1967, President Nasser of the United Arab Republic announced that his country would prevent Israeli ships and other ships carrying strategic cargo from transiting the Straits of Tiran at the entrance to the Gulf of Aqaba.[1] This action followed withdrawal of the United Nations Expeditionary Force (UNEF) from the Egypt-Israel border and from Sharm-El-Sheikh, a fortification overlooking the Straits of Tiran from which that waterway can be militarily controlled.[2] (Previously, Egypt had blockaded the Gulf of Aqaba to Israeli shipping from 1948 to 1957.)

This action by Egypt, which had been coupled with a massing of armed forces along her border with Israel, evoked consternation and protest from the major maritime nations of the world, the United Kingdom and the United States, and the issues were debated in the Security Council of the United Nations in late May 1967.[3] The basic issue posed by the Egyptian blockade was the legality of such action, in opposition to the claim of Israel to the right of innocent passage through the Straits of Tiran and Gulf of Aqaba to her southern port of Elath.

The legal arguments of the United Arab Republic and Israel were expressed in the U.N. debate. As will be seen, they are based upon two different sets of operative facts.

The position of the United Arab Republic is twofold. First, the Gulf of Aqaba is an Arab "closed sea" and therefore constitutes internal waters of the littoral states. International law recognizes a right of innocent passage through the territorial sea, but no such right exists as to a state's internal waters. Apparently aware of the provisions of article 16, paragraph 4, of the Convention on the Territorial Sea and Contiguous Zone, prohibiting the suspension of innocent passage through international straits connecting the high seas with the territorial sea of another state, the United Arab Republic maintains that Israel has no territorial sea in the Gulf of Aqaba because her presence at Elath was the product of aggression. Such aggression, it is argued, occurred after the Egypt-Israel Armistice Agreement in 1949, and the applicable international law doctrine is that belligerent occupation cannot be legally converted into sovereignty, unless the state of war was concluded by a peace treaty.

The second part of the U.A.R. position is that the Armistice Agreement of 1949 served only to end hostilities between Egypt and Israel and did not terminate the state of belligerency between the disputants. Therefore, Egypt was perfectly within her rights as a belligerent to blockade Israeli shipping and goods from the Straits of Tiran and Gulf of Aqaba, and Israel had no right of innocent passage therein.[4] This latter argument, if the underlying basic as-

sumption of continued belligerency since 1948 is accepted, does not depend upon the validity of the "internal waters" claim.

In support of its claim that the Gulf of Aqaba consists entirely of the internal waters of the three littoral states (U.A.R., Jordan, Saudi Arabia) having a *legitimate* sovereign presence on the gulf, the United Arab Republic cited the example of the Gulf of Fonseca and the judicial decision thereon.

The Gulf of Fonseca case was an action brought in the Central American Court of Justice to set aside a Nicaraguan grant to the United States of a 99-year right to operate a naval base on Nicaraguan territory bordering the Gulf of Fonseca.[5] El Salvador and Costa Rica, both littoral on the gulf, objected to the grant. Although there was no dispute between the parties that the waters of the gulf were jointly owned and were a "closed bay," Nicaragua claimed that they should be divided by extending the land boundaries, whereas Costa Rica claimed that the three states had joint, undivided ownership. In sustaining the Costa Rican claim, the Court determined that the Gulf of Fonseca "belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua." Its rationale was that the Gulf of Fonseca

> . . . combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense.[6]

The Court held that the gulf waters were jointly owned internal waters, subject to the territorial sea of each coastal state.[7]

Before the Security Council the U.A.R. related the historical facts that the Gulf of Aqaba had been under continuous Arab control for over 1,000 years and constituted an inland waterway subject to absolute Arab sovereignty, and argued that it therefore fell within the category of historical gulfs which are governed by national internal law rather than by international law. The Gulf of Fonseca decision was claimed to be in point, since it concerned a multinational bay; furthermore, the United States had not disputed the position that the Gulf of Fonseca is part of the internal waters of the littoral states and had accepted the Court's decision.

In support of its argument for a continuing status of belligerency, the United Arab Republic maintained that Israel had constantly violated the armistice agreement and had committed acts of aggression against the Arab states and that the 1956 war had not altered the U.A.R. rights in its waters; furthermore, Britain recognized the blockade in 1951, and U.S. ships observed it until 1956.

On the other side of the dispute, Israel claimed that the Gulf of Aqaba is an international waterway, and, consequently the Straits of Tiran are an international strait in which the right of innocent passage cannot be suspended. In addition, Israel saw the 1949 armistice agreements as terminating the belligerency between herself and Egypt and Jordan; therefore, Egyptian action to interfere with shipping in the Straits of Tiran violated international law.[8]

Supporting the Israel position on the juridical status of the waterway is an *aide-memoire* from U.S. Secretary of State Dulles to the Israeli Ambassador, Abba Eban, of 11 February 1957. In this document the United States recog-

nized that Israel was still in occupation of areas stipulated by the armistice agreements to be occupied by Egypt but went on to declare that " . . . the United States believes that the Gulf [of Aqaba] comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto."[9] Israel also contended that the international character of the gulf was attested to by its use by a significant amount of shipping under many different flags, and that such character had been confirmed in the General Assembly in March 1957.

With regard to the belligerency claim of the Arab states, Israel argued that the Security Council resolution of 1 September 1951 recognized that the armistice agreements had legally terminated the belligerency: " . . . since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent. . . . "[10] Thus, disagreement centered on two issues that need further analysis: the status of the Gulf of Aqaba and the alleged status of belligerency. Concerning the first issue, the Arab claims to a closed sea (internal waters) in the gulf show several weaknesses. Although the Gulf of Aqaba had been under continuous Ottoman control for about 1,200 years, no joint closed-sea claim was made by the coastal Arab states at the time they gained sovereignty in the present century. Such a claim was apparently not asserted until 1957, by Saudi Arabia.[11] No Arab protest was heard against the use of the gulf by Israeli shipping during the period from 1957 to 1967. Nor have the Arab states agreed to a joint control over the gulf, as the coastal states had done in the Gulf of Fonseca. In any case, unlike the Gulf of Fonseca regime, the Arab closed-sea claims have not achieved general international acceptance. Moreover, Saudi Arabia and Egypt claimed only 6-mile territorial waters until 1958, and an argument could have been made that, since the Gulf of Aqaba exceeded 12 miles in width, it contained portions of the high seas. In 1958 both countries extended their territorial sea claims to 12 miles, thus eliminating, from their standpoint, the possibility of a claim of high seas in the gulf.[12] Yet, throughout the disputes between Israel and Egypt (U.A.R.), the latter has pledged to guarantee [to the states of the world] "free and innocent passage according to international law," which does not include such a commitment to an opposing belligerent.[13] Such a position is, of course, inconsistent with a closed-sea claim.

Israel's legal position on the Gulf of Aqaba likewise contains some weaknesses. The Dulles *aide-memoire* cited above appeared to condition the recognition of the international character of the gulf upon Israel's withdrawal of troops from Egyptian territory. The 1 September 1951 Security Council resolution dealt with the Suez Canal only and could be characterized as political in nature and not intended to make a legal determination of the status of nonbelligerency. Finally, the Arab claim that Israel's presence at Elath on the Gulf of Aqaba lacks legitimacy fails to take into account the fact that such occupancy was clearly set forth in the Israel-Jordan Armistice Agreement, which followed the occupation in question.[14]

The U.S. position on the U.A.R.'s denial of passage through the Straits of Tiran was expressed both by President Johnson in a statement released 23 May 1967 and by Ambassador Goldberg in the Security Council debates. The President stated that:

> . . . The United States considers the gulf [of Aqaba] to be an international waterway and feels the blockade of Israeli shipping is illegal . . . The Right of free, innocent passage of the international waterway is a vital interest of the entire international community.[15]

Ambassador Goldberg echoed these views, noting that the "rights of all trading nations under international law" were at stake and cited article 16, paragraph 4, of the 1958 Convention on the Territorial Sea and Contiguous Zone as expressive of that law.[16] Although the U.A.R. representative might have argued, in rebuttal to the U.S. position, that article 16, paragraph 4, had no applicability to the Arab states since they had not ratified the Convention, he instead argued that it was inapplicable to situations involving armed conflict.[17] Thus the U.A.R. appears to have conceded that article 16, paragraph 4, is expressive of customary international law in time of peace.

What then is the status of the Gulf of Aqaba? As noted in chapter II, the 1958 Conference on the Law of the Sea did not attempt to codify the law with respect to multinational bays. After extended debate on the wording of article 16-4, it set forth a general principle of freedom of international sea transit which guarantees innocent passage through straits connecting the high seas with a state's internal waters.

As to gulfs and bays bordered by more than one state, a rule of general acceptance has been that:

> . . . all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations, including men-of-war, . . .[18]

In light of this criterion, the recency of the Arab claim to a closed sea, and the lack of international recognition of such claim, it is submitted that the facts underlying the Gulf of Fonseca decision are distinguishable from the facts of the instant case. The waters of the Gulf of Aqaba do not constitute internal waters of the littoral Arab states, and the Straits of Tiran are not subject to suspension of the right of innocent passage.

The final portion of the U.A.R. legal justification for blockading the Straits of Tiran to Israeli shipping was that a state of belligerency existed between that state and Israel, since the armistice agreements then effective merely terminated hostilities. This position does not depend upon the juridical nature of the waters of the gulf, since a belligerent is entitled to prevent the passage of the vessels of an opposing belligerent, or cargo bound for him. The opposing Israeli position--supported by the United States--hold that the armistice agreements of 1949 with Egypt and Jordan terminated belligerency as well as hostilities and that the U.N. Security Council had so recognized in its resolution of 1 September 1951 and discussions in 1957. In any event, it is beyond the scope of this paper to explore the merits of the conflicting views as to the legal effect of an armistice. That portion of the U.A.R. claim will be determined with reference to rules other than the Law of the Sea.

Vilkitsky Straits Incident. In August 1967 the United States announced a planned scientific expedition by two Coast Guard icebreakers, *Edisto* and *Northwind*, to circumnavigate the Arctic Ocean. The original itinerary would have taken the ships north of several Soviet islands, including Severnaya Zemlya, and they would thereby have traveled entirely on the high seas.

Ice conditions, however, prevented the icebreakers from going to the north of Severnaya Zemlya; the U.S. Embassy in Moscow so notified the Soviet Ministry of Foreign Affairs on 24 August, stating that it would be necessary for the two ships to transit the Vilkitsky Straits between Severnaya Zemlya and the mainland. The Soviet Ministry of Foreign Affairs replied to the U.S. Embassy that the straits were Soviet territorial waters.

On 28 August the Soviet Ministry, responding to a message from the U.S. ships to the Soviet Ministry of the Maritime Fleet, reaffirmed its earlier declaration and stated further that the U.S.S.R. would claim that transit of the ships through the Vilkitsky Straits would violate Soviet frontiers. The United States then determined not to send the icebreakers through the Vilkitsky Straits and changed their assignments. The U.S. Embassy in Moscow sent a note of protest on 30 August which stated, "that the Soviet law cannot have the effect of changing the status of international waters and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and Contiguous Zone . . . to which the Soviet Union is a party." The note apparently went on to point out that the right of innocent passage existed through straits used for international navigation between two parts of the high seas whether or not they be characterized as having overlapping territorial waters and that an unlimited right of passage exists in straits comprising both high seas and territorial waters.[19] (The Vilkitsky Straits are about 20 miles wide at the narrowest point; the U.S.S.R. claims a 12-mile territorial sea.)

From the cited State Department account, the Soviet legal position is not clear. It could have been based on any of the following three theories: the passage of the U.S. ships was prejudicial to Soviet peace, good order, or security; the ships in question being warships (within the definition of article 8 of the 1958 Geneva Convention on the High Seas), their passage would not be in conformity with the requirements of Soviet domestic legislation; finally, it might have been claimed that Vilkitsky Straits are not an international waterway, through which a right of innocent passage exists for foreign ships.

With regard to the possible prejudice to Soviet security, it is difficult to envision how a scientific expedition would be thusly prejudicial absent some hostile action by the ships themselves. The fact of passage itself must not be sufficient ground for the coastal state to deny innocent passage.

At the time of signing the Convention on the Territorial Sea and Contiguous Zone, the Soviet Union entered two reservations, one of which concerned article 23: "The Government of the Union of Soviet Socialist Republics considers that a coastal state has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters."[20] In pursuance of such position, the U.S.S.R. has enacted laws which require prior consent for the innocent passage of warships. Such consent must be requested through diplomatic channels 30 days in advance.[21] Article 23 of the Convention provides that, "if any warship does not comply with the regulations of the coastal state concerning passage . . . the coastal state may require the warships to leave the territorial sea." The "regulations . . . concerning passage" are deemed to be rules of navigation.[22] Further, the Soviet regulations cannot be such as to deny innocent passage, in view of the provision of article 17 and discussions held thereon at the 1958 Law of the Sea Conference. In the present case, the United States did not and could not foresee, at least 30 days in advance, that its ships would be forced by ice to transit Soviet territorial waters. Hence, if noncompliance with the authorization provisions was part (or all) of the basis for denying passage, that denial was improper.

Whether the Vilkitsky Straits are an international strait, through which innocent passage cannot be suspended, is not free from doubt. The text writers generally agree that a strait in the geographical sense is not necessarily one in the legal sense.[23] The International

Court of Justice found the Corfu Channel to be legally an international strait on the bases that it connected two portions of the high seas and was used for international navigation. The Court rejected the idea that the strait be a necessary one for shipping. Though the Corfu Channal case decision is cited as the leading authority on the point, differing conclusions are drawn from it as to the legal test for an international strait. Oppenheim states that "It is sufficient that [the strait] has been a useful route for international maritime traffic."[24] Professor Baxter, concurring generally in the foregoing view, warns that "It is impossible to answer in the abstract how many straits meet the requirement of being 'useful' for international navigation, for the test applied by the Court lays more emphasis on the practices of shipping than on geographic necessities."[25]

A third view is that expressed by Judge Azevedo in his dissenting opinion in the Corfu Channel case: ". . . the notion of an international strait is always connected with a minimum of special utility, sufficient to justify the restriction of the rights of the coastal State--which rights must be assumed to be complete and equal to those of other States."[26] From this O'Connell deduces that the "correct approach is to balance the interest which the coastal state has in its own territorial sea against that which the international maritime community has in traversing that passage."[27]

In view of the location of the Vilkitsky Straits, north of Siberia, where they are closed by ice for most of the year, it is doubted whether the international maritime community has, in the past, made use of them. On the other hand, if the test be one of present usefulness, in times of icing to the north of Severnaya Zemlya the Vilkitsky Straits are indeed the only means of transiting the Arctic Ocean at that point. Applying the "balancing of interests" test, it is submitted that the interests of the maritime nations in navigating the Arctic regions, though possibly slight today, certainly outweigh the even slighter security interests of the U.S.S.R. in denying passage to ships which desire to pass peacefully.

When considering the foregoing, together with the action of the 1958 Law of the Sea Conference in expanding the rights of nations for their ships to pass innocently through straits in article 16, paragraph 4, of the Convention on the Territorial Sea and Contiguous Zone, it is concluded that the Vilkitsky Straits are international and that the U.S.S.R. should not have denied innocent passage through them on that account.

Whatever the Soviet legal theory may have been in its denial of usage, it should be noted that the United States preserved its legal position by its note of protest which asserted the international nature of the Vilkitsky Straits.

IV--CONCLUSIONS

The action of the United Arab Republic in denying Israeli shipping innocent passage through the Straits of Tiran and Gulf of Aqaba in no way detracts from the internationally recognized right of innocent passage. Arab declarations expressly recognized the existence of such right. Innocent passage was only denied by the U.A.R. insofar as it benefited a claimed opposing belligerent. Whether such denial comported with international law will depend solely on the legal effect one may attribute to the armistice agreements between Israel and Egypt and Jordan. If they terminated belligerency, as Israel and the United States claim, then Egypt was not legally justified in denying Israel the right of innocent passage. But at all times Egypt did recognize that a right of innocent passage through the Straits of Tiran and Gulf of Aqaba existed as to nonbelligerent nations.

The U.S.S.R. denial of innocent passage through the Vilkitsky Straits is consistent with the Soviet position regarding the innocent passage of warships. She has continuously maintained that such passage is subject to the prior approval of the littoral state, and her internal laws require her approval of 30 days in advance.

It is concluded that no new international legal usages have been initiated as a result of the denial of innocent passage to Israel in the Gulf of Aqaba and Straits of Tiran: the legal positions of Israel and the Arab states have remained materially unaltered for the last decade. With regard to the Vilkitsky Straits incident, it appears that the traditional Soviet position with regard to innocent passage of warships was maintained. There was one possibly novel aspect to that case, however. In attempting the passage of its ships through Vilkitsky Straits, the United States was asserting the international legal character of those waters, a position which the U.S.S.R. apparently contested. Although the author favors characterizing the Vilkitsky Straits as international straits in which the right of innocent passage exists, the issue is by no means free of doubt. If the Vilkitsky Straits are not deemed international straits, then the United States has taken the first step toward changing that regime.

The factor common to these two cases and reflected in the discussions at the 1958 Law of the Sea Conference is that the determination of the innocence of passage initially rests with the coastal state.

The discussions on the Convention on the Territorial Sea and Contiguous Zone demonstrated that each state approaches the codification and development of international law from the standpoint of promoting such legal rules or principles as will serve its own perceived best interests. Any specific national goal may not, however, be in accord with what the community of nations conceives to be in the best interest of all states. One may expect that a state's natural, initial inclination, when judging possible prejudice to its peace, good order, or security, will be to apply a purely subjective standard. The discussions on the Convention recognized this situation and made it clear that the coastal state's determination of prejudice to its security will be subject to review by the flag state of a ship which suffers a denial of innocent passage and by world opinion. Diplomatic protest and the seeking of reparations (apology and/or compensation) are avenues by which a state may seek redress for a denial of innocent passage to a ship of its flag when it deems the denial to have been improper. Just such measures were taken by the United Kingdom in the Corfu Channel incident. The additional step of seeking redress before the International Court of Justice was undertaken in that case, and the Court then had occasion to hear evidence and render an objective judgment on the merits of the competing claims.

Thus the coastal state's determination of whether a particular passage is

BIOGRAPHIC SUMMARY

Comdr. Peter B. Walker, JAGC, U.S. Navy, holds a bachelor's degree from Harvard University, a bachelor of laws degree from The George Washington University, and has done postgraduate work in the field of international affairs with The George Washington University. His previous legal duties include: Assistant Staff Legal Officer, Commander Service Force, U.S. Pacific Fleet; Senior Defense Counsel, 11th Naval District; and District Legal Officer, 17th Naval District. Commander Walker is a graduate of the Naval War College, School of Naval Command and Staff, Class of 1968, and is currently serving on the Naval War College faculty.

prejudicial to its security must be made objectively: if it is challenged it will be subject to review in a manner similar to that in the Corfu Channel incident. A concern that the coastal state's basis for judgment be as objective as possible was amply demonstrated in the discussions of the Territorial Sea Convention. Even though each state's evaluation of its security will be a reflection of its individual personality, which in turn is the product of its historical heritage as well as present world conditions, the only workable standard for the determination of a state's denial or suspension of innocent passage in its territorial sea is one of objectivity: is such a denial really necessary, and are the circumstances such that the community of nations, in retrospect, would approve?

If there is not such an objective test to be applied to suspensions or denials of innocent passage in practice, the community of nations will be subject to the arbitrary denial of passage by states which consider, subjectively, only their own parochial interests.

FOOTNOTES

I--FREEDOM OF THE SEAS

1. Queen Elizabeth I, quoted in Herbert A. Smith, *The Law and Custom of the Sea*, 3d ed. (London: Stevens, 1959), p. 59.
2. Louise F. Brown, *The Freedom of the Seas* (New York: Dutton, 1919), p. 3-17.
3. Smith, p. 59.
4. Hugo Grotius, *The Freedom of the Seas* (New York: Oxford University Press, 1916), p. 7, 32, 34.
5. Teruo Kobayashi, *The Anglo-Norwegian Fisheries Case of 1951 and the Changing Law of the Territorial Sea* (Gainesville: University of Florida Press, 1965), p. 6.
6. *Ibid.*, p. 7.
7. Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: Jennings, 1927), p. 6.
8. Conference for the Codification of International Law, "Report of the Second Committee," *The American Journal of International Law*, July 1930 Supplement, p. 234-239.
9. United Nations Conference on the Law of the Sea, 2d, 1960, *Official Records*, A/CONF. 19/8 (Geneva: 1960), p. 30.
10. *Ibid.*, p. 158-163.

II--NATURE AND ATTRIBUTES OF INNOCENT PASSAGE

1. Jessup, p. 115-119.
2. Lassa F.L. Oppenheim, *International Law*, 8th ed. (London: Longmans, Green, 1955), v. I, p. 467; Smith, p. 46.
3. United Nations Conference on the Law of the Sea, 1st, 1958, *Official Records*, A/CONF. 13/L52 (Geneva: 1958), v. II, p. 132. [Note: Articles 14 through 22 of the Convention on the Territorial Sea and Contiguous Zone correspond to the International Law Commission's draft articles 15 through 23 respectively; article 23 of the Convention corresponds to the ILC draft article 25. For ease of reference, and unless otherwise specified, all references to both the draft articles and the Convention articles will use only the numbers of the articles as they now appear in the final Convention.]
4. "The Law of Territorial Waters," *The American Journal of International Law*, April 1929 Special Supplement, p. 295.
5. Conference for the Codification of International Law, "Report of the Second Committee (Territorial Sea), Annex 1." *The American Journal of International Law*, July 1930 Supplement, p. 240.
6. Article 14. 1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
   2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

7. *First Conference on the Law of the Sea*, v. II, p. 259.
8. Jessup, p. 120, 123.
9. "The Law of Territorial Waters," p. 295 (article 14 and comment thereon).
10. Additional restrictions on the exercise of innocent passage in cases of ships proceeding to or from internal waters were, however, included in articles 17(2), 20(2), and 21(3). Article 14(2) reflects the basic policy behind according a right of innocent passage: the desirability of promoting the widest and freest use of the seas for all nations, while maintaining in proper balance the interests of coastal states.
11. Smith, p. 46.
12. Jessup, p. 123.
13. "3. Passage included stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary for *force majeure* or by distress."
14. *Force majeure* may be a storm, action of mutineers or pirates, or shortage of food or other essential supplies not caused by the ship's own improvidence. "Judicial Decisions Involving Questions of International Law; General Claims Commission--United States and Mexico, Kate A. Hoff v. United Mexican States," *The American Journal of International Law*, October 1929, p. 860.
15. United Nations, International Law Commission, *Yearbook, 1956*, A/CN/.4/Ser.A/1956/Add. 1 (New York: 1957), v. II, p. 272.
16. *First Conference on the Law of the Sea*, A/CONF. 13/39, v. III, p. 85.
17. *Ibid.*, A/CONF. 13/C.1/L.23, p. 76.
18. *Ibid.*, p. 83.
19. *Ibid.*, p. 85.
20. *Ibid.*, p. 87, 229.
21. "Report of the Second Codification Committee," p. 241, 246.
22. International Law Commission, *Yearbook, 1956*, v. II, p. 274. "Article 17. Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation."
23. Article 16. 1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
2. In the case of ships proceeding to internal waters, the coastal State shall also have the right to take necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.
3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.
4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.
24. The Hague, International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (Leyden: Sijthoff, 1949), p. 4.
25. *Ibid.*, p. 29. English translation by the author.
26. *Ibid.*, p. 32.
27. International Law Commission, *Yearbook, 1956*, v. II, p. 273.
28. *First Conference on the Law of the Sea*, v. III, p. 94.
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*, p. 93, 95.
32. *Ibid.*, p. 96.
33. *Ibid.*, v. II, p. 65.
34. *Ibid.*, v. III, p. 100; v. II, p. 65.
35. *Ibid.*, v. III, p. 100; A/CONF. 13/C.1/L.44, p. 222.
36. *Ibid.*, p. 95, 100.
37. International Law Commission, *Yearbook, 1956*, v. II, p. 273.
38. *First Conference on the Law of the Sea*, v. III, p. 77-78.
39. *Ibid.*, p. 220.
40. *Ibid.*, p. 218. "Article 15. 2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea."

41. "Report of the Second Codification Committee," p. 243.
42. Jessup, p. 120.
43. "Report of the Second Codification Committee," p. 243.
44. International Law Commission, *Yearbook, 1956*, v. II, p. 256.
45. *First Conference on the Law of the Sea*, v. II, p. 67.
46. The Hague, International Court of Justice, *The Corfu Channel Case* (Hague: 1950), v. II, p. 292-293.
47. U.S. Treaties, etc., *United States Treaties and Other International Agreements* (Washington: U.S. Govt. Print. Off., 1964), v. XV, pt. 2, p. 1645, 1646, 1655, 1665, 1669, 1670.
48. International Law Commission, *Yearbook, 1956*, v. II, p. 256.
49. U.S. Naval War College, *International Law Situations, 1908* (Washington: U.S. Govt. Print. Off., 1909), p. 216.
50. U.S. Naval War College, *International Law Situations and Documents, 1956* (Washington: U.S. Govt. Print. Off., 1957), p. 4-48.
51. *Norway No. 1 (1950), British Command Paper No. 8012*, reproduced *Ibid.*, p. 30-48.
52. Hague Convention XIII has generally been held to express the customary international law applicable to World War II. *Ibid.*, p. 11-12.
53. "Article 12. In the absence of special provisions to the contrary in the legislation of a neutral power, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said power for more than 24 hours, except in the cases covered by the present Convention." U.S. Naval War College, *International Law Situations, 1908*, p. 216.
54. U.S. Naval War College, *International Law Situations and Documents, 1956*, p. 15.
55. U.S. Naval War College, *International Law Studies, 1955*, p. 383.
56. *Ibid.*, p. 391.
57. Richard R. Baxter, *The Law of International Waterways*, (Cambridge: Harvard University Press, 1964), p. 205.

III--RECENT INCIDENTS INVOLVING INNOCENT PASSAGE

1. United Nations, Security Council, *Official Records, Debates of 24 May 1967*, S/PV. 1342 (New York: 1967). (In the Security Council debates this action was referred to as a "blockade.")
2. The Gulf of Aqaba is a long, narrow gulf on the east side of the Sinai Peninsula, bordered by the United Arab Republic on the west, Saudi Arabia on the east, and by Israel and Jordan at the northern end. Length of the gulf is about 90 miles; breadth at entrance, about 5-¾ miles; maximum width, about 15 miles. Entrance is by means of two navigable channels through the Straits of Tiran, of maximum widths of about 1,300 yards and 950 yeards. *First Conference on the Law of the Sea*, v. I, p. 208.
3. United Nations, Security Council, *Official Records, Israel and United Arab Republic*, S/PV. 1341 through S/PV. 1345 (New York: 1967).
4. *Ibid.*, S/PV. 1343, p. 31-38.
5. "The Republic of El Salvador v. the Republic of Nicaragua (1917)," *The American Journal of International Law*, July 1917, p. 674-730.
6. *Ibid.*, p. 705.
7. *Ibid.*, p. 700.
8. United Nations, Security Council, S/PV. 1343, p. 67-68.
9. "Department Announcement, February 17." *The Department of State Bulletin*, 11 March 1957, p. 392-393.
10. United Nations, Security Council, *Official Records, Resolutions and Decisions of the Security Council 1951*, S/INF/6 Rev. 1 (New York: 1956), p. 11.
11. Charles B. Selak, Jr., "A Consideration of the Legal Status of the Gulf of Aqaba," *The American Journal of International Law*, October 1958, p. 676-677, 692.
12. *Second Conference on the Law of the Sea*, A/CONF. 19/4, p. 162.
13. United Nations, Security Council, S/PV. 1343, p. 41.
14. Selak, p. 680.
15. "The United States Calls for Restraint in the Near East," *The Department of State Bulletin*, 12 June 1967, p. 870-871.
16. United Nations, Security Council, S/PV. 1343, p. 17.
17. *Ibid.*, S/PV. 1344, p. 47.
18. Oppenheim, v. I, p. 508-509; Leo Gross, "The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba," *The American Journal of International Law*, July 1959, p. 576.

19. "Soviet Union Bars Completion of U.S. Scientific Voyage," *The Department of State Bulletin*, 18 September 1967, p. 362.
20. U.S. Treaties, etc., *U.S. Treaties and Other International Agreements* (Washington: U.S. Govt. Print. Off., 1964), v. XV, pt. 2, p. 1670.
21. William E. Butler, "The Legal Regime of Russian Territorial Waters," *The American Journal of International Law*, January 1968, p. 68.
22. Baxter, p. 168.
23. Baxter, p. 3; Daniel P. O'Connell, *International Law* (Dobbs Ferry, N.Y.: Oceana, 1965), p. 563.
24. Oppenheim, p. 512.
25. Baxter, p. 9.
26. International Court of Justice Corfu Channel Decision, p. 106.
27. O'Connell, p. 563.

Ψ

There is nothing in the world more soft and weak than water, yet for attacking things that are firm and strong, nothing surpasses it.

Lao Tze, fl. 6th century B.C.

Readers' Comments

This section has been established to provide a forum for the useful exchange of ideas between *Naval War College Review* readers and the Naval War College.

Unofficial comments by the readers on articles which appear in the *Review* are encouraged and will be considered for publication in subsequent issues.

Comments should be addressed to: The Editor, *Naval War College Review*, Naval War College, Newport, Rhode Island 02840

"Prisoner of War Negotiations: the Korean Experience and Lesson," in the September *Naval War College Review* was very interesting and its advice very pertinent at this time.

There is, however, a fundamental omission from the article which somewhat distorts the Korea negotiation situation.

Colonel Harry B. Ball says one of the mistakes in the Korea negotiations was the settlement of all issues except the prisoner repatriation one so that we had no further matters to use as leverage to obtain agreement on the prisoner issue.

Technically he is correct, but one of those issues so settled was the very thing which gave us the powerful leverage which eventually obtained victory on the POW issue. That was our insistence that the line of battle at the time of the armistice would become the new boundary of two Koreas. Our battle successes resulted in a line generally far north of the original 38th parallel boundary.

Colonel Ball does not even mention this UN victory, let alone discuss its impact on the prisoner issue.

This oversight in the article is not, of course, pertinent to Vietnam. For we have pledged no territorial acquisition there, and thus do not have the possession of territory of the other side--and the threat of taking possession of more--to use as a bargaining tool.

* * * * * * *

John Slinkman
Editor, *Navy Times*

TRENDS IN FLAG SELECTION CRITERIA

AND THEIR EFFECT ON CAREER MANAGEMENT

A research paper prepared by

Lieutenant Commander Thomas R.M. Emery, U.S. Navy

School of Naval Command and Staff

INTRODUCTION

One of the most trying problems that faces any organization, whether civilian or military, is the choice and appointment of top management. Richard Jackson, former Assistant Secretary of the Navy, made the following observation:

> There is no important single task than the selection of persons for executive and managerial positions in an organization. The men and women in these positions set the climate for the organization and largely determine its success.[1]

The ultimate decision as to who is or is not selected has far-reaching and lasting effects. In a recent survey of industrial company presidents, more than a third indicated that the worst mistake made last year, and the one that hurt the company most, was either having a man in a key spot who did not fit or failure to get one who did.[2]

As with any group of ambitious and well-educated Americans, the lower officer grades are quick to perceive any obvious shifts in the leadership characteristics and career patterns of officers selected for top management. These career-motivated officers quickly analyze their own backgrounds in terms of changing promotional criteria in order

to fulfill their professional aspirations. How well they interpret and apply the career guidelines that the top management follow in their selection of executives will ultimately determine an individual's acceptability for selection.

In the Navy, the rank of rear admiral represents entry into the top management level. This paper seeks to examine the criteria for selection to flag officer and assess their effect upon individual career management of future eligibles. To determine a current attitude toward the criteria and the selection process, a questionnaire survey was conducted as part of the research for this paper. The sample for this survey comprised 13.3 percent of the active duty unrestricted line captains and 15.9 percent of the active duty unrestricted line rear admirals and vice admirals.

I--THE NAVAL SELECTION SYSTEM

Evolution of the Naval Selection System. Navy flag rank selection dates back to the year 1775. A Naval Committee, composed of influential colonists, was charged with the responsibility for fitting out, arming, and staffing four merchantmen.[1] To command this force the rank of Commander in Chief of the Fleet was to be established; it was to be a rank equal to Gen. George Washington's. This position was offered to Esek Hopkins who at the time was Commander in Chief of all the land forces in the Colony of Rhode Island. Esek's brother, Stephen, tendered the offering letter 6 November 1775:

> Dear Sir:
>
> You will perceive that the Committee have pitched upon you to take command of a small Fleet which they hope will be but the beginning of one much larger. You may be more serviceable to your Country than you can in any other way. . . . Your pay and perquisites will be such as you will have no reason to complain of . . . and you may assure all, that the Congress rise stronger and stronger in the spirit of opposition to the tyrannical measures of [British] administration.
>
> I am your affectionate brother,
> Step Hopkins.[2]

Esek Hopkins accepted the job and remained in this position (he was addressed as Commodore) until suspended from duty in 1778.[3]

The next major development came in 1862 when the ranks of commodore and rear admiral were established, and it was then that D.G. Farragut, L.M. Goldsborough, S.G. DuPont and A.H. Foote were appointed to the latter grade.[4] On 25 July 1866 Congress created the grade of admiral to which Rear Admiral Farragut was appointed.[5]

The selection system that remained in effect until 1916 was based primarily on seniority. Rather than a selection system, it could be more accurately described as a test of survivability. The criteria were mainly the ability to pass occasional examinations and to stay out of serious trouble or, as one author described it, "promotion was based on seniority, and the dullards and indolent, provided they passed occasional examinations of a routine character and were not notoriously immoral, advanced as rapidly as their more capable brothers."[6] Another writer put it more vividly--"The requirements were: keep your digestion in order and refrain from striking your superior officer."[7] A modification to the system came in 1899 when a "plucking board" was established. This board weeded out the "bad ones" with the remaining being promoted by seniority.[8] In 1917 the selection system as it is known today was put into effect, and the plucking board was discontinued.

The progressive and aggressive Secretary of the Navy, Josephus Daniels, with the aid of his Assistant Secretary, Franklin D. Roosevelt, successfully sponsored a law that changed promotion criteria from the archaic seniority system to the merit system.[9] The act, Public Law 241, was passed on 29 August 1916. This charter provided for

Naval War College Review, Vol. 22 [1969], No. 1, Art. 1

a Selection Board composed of nine rear admirals to select the appropriate number of commanders, captains, and rear admirals. These nine rear admirals were appointed by the Secretary of the Navy and convened as early as possible during the month of December. The basic criteria involved in the selection process were:

1. Pass professional examinations prescribed by law for the officers promoted by seniority;
2. Pass a physical;
3. Have 2 years sea duty in the present grade on seagoing ships;
4. Receive a "yes" from six of the nine rear admirals on the board; and lastly
5. Be acceptable to the President of the United States.[10]

The essential difference in the system used currently is that the requirement for promotion exams and the 2 years of sea duty have been discontinued.

Flag Selection Criteria. From 1917 until 1966 there was only one written document that was made available to the board. (During the Second World War from 1942 to 1945 the Selection Board records were, and remain, classified.) This document took the form of a legal precept from the Secretary of the Navy to the president of the board containing the following items:

1. The membership of the board by name;
2. The number of flag officers to be selected;
3. When and for how long the board was to meet;
4. The oaths to be taken; and,
5. General guidance for the conduct and disposition of the proceedings.

In 1953 this precept was joined by a personal letter from the Secretary to the president of the Selection Board containing specific and general guidance which the Secretary felt was necessary for the president and other members of the board. The first guidance letter, from Secretary R.B. Anderson to Vice Adm. R.L. Conolly on 15 July 1953, established a letter writing precedent that has been continued by each succeeding Secretary.

The scope of these guidance letters has increased as has their dissemination. The 1956 letter was the first to be discussed in a nationally distributed publication. It became a subject for comment in the *Navy Times*, and this same publication printed the 1965 letter in its entirety.

These guidance letters were the only publicized criteria for flag officer selection until the Pride Board Report of 1963. The Pride Board study delineated the criteria for selection to flag rank, and it has been the only study of its kind.[11] The legal basis for selection, Title 10, *U.S. Code*, states that promotion will be from those officers "best fitted." However, "best fitted" is nowhere defined. The guidance letters, therefore, have generally been the only continuing written criteria for flag selection and have afforded the sole means to observe any minor or major variations in the criteria dictated by the changing needs of the Navy.

Investigation of the flag selection process therefore necessitates a comparative examination of the guidance letters to determine criteria and to weigh the emphasis placed on them by the various Secretaries of the Navy. Through this procedure it may be possible to identify trends in both criteria and rationale for promotion to flag rank.

II--ANALYSIS OF CRITERIA AND TRENDS

Division of Criteria. Selection criteria set forth in the guidance letters may be arbitrarily divided into two categories. The first deals with individual traits while the second relates to the actual

professional performance and development of the officer.

The first category contains qualities that relate to the "whole man" concept. They are physiological, psychological, and educational in nature. To group these qualities under one term such as "personality traits" is neither accurate nor appropriate. However, for ease of reference, the term "personality traits" will be used to include all the qualities of man that are either inherent or developed.

In this first category, 36 descriptive phrases were utilized by the various Secretaries. Because of the similarity of some of these phrases, they can be condensed into 18 groups:

1. Intellect--analytical thought process, flexibility of mind, imagination, technical/scientific knowledge, perception.
2. Judgment--mature policy direction, imaginative and realistic planning, keen discernment of future operational requirements.
3. Integrity--high character, strong moral fiber.
4. Potential.
5. Past performance--demonstrated competence.
6. Progressive--visionary, creativity, originality, resourcefulness.
7. National views (vice parochialism)--integrated Defense picture.
8. Adept in relations with officers of other services, Government officials, and members of Congress.
9. Military statesman--overseas ability.
10. Command ability--command at sea ability, command and executive management ability within the Naval Establishment, management ability, organizational ability, executive management ability.
11. Potential to command in combat.
12. Magnetic personal leadership.
13. Energy--diligence.
14. Strong physical stamina.
15. Youth.
16. Articulate in oral and written communications.
17. Socially adept--cultured.
18. Professional ability--seamanship and naval science proficiency.

The grouping that received the greatest emphasis was number 10--command ability. This occurred because the traditional command at sea concept was merged with the modern management concept under the single term of command. Henri Fayol, the French industrialist and one of the founders of modern management theory, regarded " . . . the elements of management as its functions [which were] . . . planning, organizing, command, coordination and control."[1] He further defined command as " . . . the operation of organization . . . and as [the] direction of subordinates."[2] The Department of the Air Force notes that "management is an inherent responsibility of command."[3] Thus, in this grouping, a "commander" by definition is a "manager" and vice versa.

The second category represents professional performance and development. For simplicity of discussion the factors concerned have been grouped under the heading of "Performance Factors." This category includes 10 groupings listed below:

1. Equivalence of deep draft/major command.
2. Impact of technology on career--subspecialization and retouring.
3. Well-rounded career--broad base of experience.
4. Early selection.
5. Late selection.
6. Washington, D.C. duty.
7. Joint and international staff and agency duty--Joint/Combined/Allied/OSD duty.
8. Nuclear engineering and operations subspecialty.
9. Communications subspecialty.
10. The ability to function effec-

tively, that is, compete, in a mixed military-civilian environment.

Trend Analysis of the Personality Traits. No meaningful trends could be established for 14 of the 18 groupings. However, there was an observable trend evident for four of them--national views vis-a-vis parochialism, youth, command ability, and potential to command in combat.

The "national views" trait was first emphasized in 1961, approximately 6 months after the Kennedy administration took office with Mr. Robert S. McNamara as Secretary of Defense. The Defense Department of that period was aptly described in an Industrial College of the Armed Forces publication.

> This, then was the environment when the Kennedy administration began. The principle of civilian control had been strengthened and clarified; the concept of unified action by the Armed Forces was, as stated before, dogma; and the Congress and the Executive branch had both turned to a strong, centralized Secretary of Defense for management efficiency.[4]

Management efficiency was the quality being emphasized in 1961. It was not mentioned during the succeeding 3 years but reappeared in 1964 when Mr. Paul Nitze came into office. Mr. Nitze has continued this emphasis through the Selection Board in 1966. This trait has also been closely linked with other career criteria which will be discussed later.

Youth as a relevant trait appeared initially in 1964 with increasing emphasis through 1966. It was in response to the problem of having flag officers in the Navy older than their contemporaries of like experience in the other services. This placed the Navy at a disadvantage when it was competing with the other services for the positions of unified commanders in chief and of the Chairman of the Joint Chiefs of Staff. A small group of younger flag officers would provide, Mr. Nitze noted, "several years' experience in three and four star assignments" and offer a "credible, tangible and persuasive argument in favor of an individual's suitability for one of these senior unified command positions."[5]

The trait of "potential to command in combat" has been emphasized after each world crisis: in 1953 following the Korean war; in 1957 following our near involvement in Suez, and finally in the fall of 1965 with the increase in the tempo of operations in Southeast Asia.

The thread of "command ability" runs almost continuously through the guidance letters. Frequent reference to this trait is not surprising when it is considered that the recognized objective of a line officer's career is command. Secretary Korth emphasized the point in his 1963 letter: "The hallmark of the unrestricted line officer is a breadth of experience sufficient to qualify him for command and executive management positions within the Naval Establishment."[6]

Trend Analysis of Performance Factors. Of the 10 different groupings in this category, only 5 exhibit any continuity that could be termed as an observable trend. These 5 items are: impact of technology on career (channelization and subspecialization), deep draft/major command, duty on joint and international staffs and agencies, ability to compete with civilians in the Defense Department, and early selection.

The growth of science and technology in the last 20 years has been staggering. The extent of this growth was expressed by Dr. Alain Enthoven, Deputy Assistant Secretary of Defense, in an article in *United States Naval Institute Proceedings*, January 1964:

> Science and technology have gone through a "takeoff" and they are now in a period of rapid, accelerating, and apparently self-sustaining growth. Nuclear weapons, nuclear power, computers, large-scale rockets, and space

> flight are but the most spectacular examples of a revolution which has been led by both military men and civilian scientists.[7]

In order to cope with the advances in technology, the personnel planners adopted subspecialization. The emphasis on this concept began in 1955 and has continued to the present with only three gaps--1957, 1958, and 1962. The stress that was given to this concept by Secretary Nitze in his 1966 guidance letter is a measure of its importance:

> I am concerned that the development of this concept [subspecialization] has not proceeded with the dispatch which I believe is necessary. Indeed, I have come to the conclusion that many men avoid being so categorized because they feel that it may have an unfavorable impact on their careers. I believe that such a decision on their part is inherently unsound and in my position as Secretary, I am compelled to do everything possible to dispel such notions.[8]

The thrust of the deep draft/major command equivalent proviso was to widen the selection opportunity by increasing command opportunity. However, the necessity of retouring caused by subspecialization has been an inhibiting factor in the process of widening the selection base. By its very nature, retouring demands more of an officer's time and thus allows less opportunity to gain the desired command. It should also be noted that since 1963 there has been no qualifying reference to the deep draft/major command requirement. That is, as its not being mandatory for selection.

The next two factors will be considered together since the first is a causative agent for the second--duty on joint and international staffs and agencies that may place the military officer in a mixed civilian-military atmosphere. In this environment the military officer is required to compete with civilian contemporaries in the Defense Department. In 1964 Secretary Nitze emphasized this requirement, and his action substantiated the McNamara influence of an effective and closely coordinated Department of Defense under civilian direction and control.

A final factor to be considered as a significant trend is early selection. This item has been emphasized continuously since 1955. The early justification was, as Secretary Thomas noted in his 1955 guidance letter, " . . . an assurance to all officers that a career in the Naval service offers recognition for exceptional ability and promise, without prejudicing the normal flow to flag rank for the remainder."[9] This was the accepted reasoning until 1964 when Secretary Nitze addressed himself to the problem of "older Flag Officers." A response to this problem area was covered in the discussion of "youth," and the implementation vehicle was early selection. This thinking has essentially continued through 1966.

Overall Trend Analysis. When considering overall trend analysis, one will note the patterns that have evolved as a consequence of the technological explosion and the emphasis placed upon centralized management in the Defense Department. This latter is mentioned because of the expansive growth that has taken place in the upper management levels of the Office of the Secretary of Defense and comparable offices of the Secretary of the Navy and the Chief of Naval Operations. Specialization has been a natural development of technology and a necessity in managing complex systems in the service bureaucracy. This environment has generated the need for new skills in such areas as systems analysis and program packaging --management tools introduced by senior leadership within the Defense Department. As a measure of the importance of these skills, new educational programs were instituted. The *Naval Training Bulletin* made the following comment:

> 'Systems analysis' is another way of saying 'cost effectiveness,' which is the analysis of alternatives to produce the best choice for the money or the least cost for choice. Because it is [an] important factor in Department of Defense decision making, and in the military services' resultant need for systems analysts, a Defense Systems Analysis Education Program was established in 1965.[10]

The aforementioned evaluation of the Secretary's guidance letters indicates certain trends that can be generalized and enumerated as follows:

1. Increased emphasis on future potential;
2. Equivalence of sea commands, both in unit size and number, as a means of portraying/identifying traditional seagoing skills;
3. The search for youth in the small early selection group;
4. Utilization of subspecialty in duty assignment (retouring) and in increasing technical/scientific knowledge; and
5. Increased participation with Defense Department civilian leadership and assignment on joint-international staffs and agencies.

The remaining personality traits and factors do not provide substance for selection criteria. The Pride Board made a like observation with the following comment:

> The Board concludes that much of this counsel is valuable and valid but that its variety of viewpoint and frequent inconsistency over a period of years . . . does not materially assist the members of the selection board in making the many difficult decisions which normally confront them.[11]

The majority of these traits/factors have not only been the traditional prerequisites for flag officers, but also for naval officers in general and for civilian management. They have been publicized in a variety of ways--letters, definitions, fitness reports, management texts, newsletters, et cetera, and over a considerable time span. The most noted naval source is John Paul Jones' famous "Qualifications of the Naval Officer." The following are portions that are analogous to a large number of the guidance letters criteria:

> It is by no means enough that an officer of the navy should be a capable mariner . . . as well as a gentleman of liberal education, refined manners, punctilious courtesy, and the nicest sense of personal honour. He should . . . be able to express himself clearly . . . both with tongue and pen, [and] . . . also . . . in French and Spanish . . . [and also] be familiar with the principles of International Law, and . . . Admiralty Jurisprudence. He should also be conversant with the usage of diplomacy, and capable of maintaining, . . . diplomatic correspondence.[12]

In the management arena the issuance of these criteria has been prolific. Henri Fayol covered the subject very appropriately, writing that:

> . . . the qualities required [are] . . . physical [health, vigor, address], mental [ability to understand and learn, judgement, mental vigor, and adaptability], moral [energy, firmness, willingness to accept responsibility, initiative, loyalty, tact, dignity], qualities of general education [general acquaintance with matters not belonging exclusively to the function performed], those of special knowledge [that peculiar to the function], and of experience [knowledge arising from the work proper].[13]

Accordingly, the vast majority of the criteria enumerated in the guidance letters do not provide a cogent trend. In addition, as previously illustrated, they are not necessarily unique qualities. These guidance letters too often eloquently present previously recorded platitudinous personality traits. This practice dulls the emphasis that may be desired for a particular trait, and obscures the identification of any trends within these traits. However, since 1963 there has been a shift from this "shotgun" tendency to the more utilitarian form that does indeed supply criteria

guidance and indicates discernible trends.

III--EFFECTS OF TRENDS ON CAREER MANAGEMENT

In the following discussion the author will seek to evaluate selection criteria trends as they affect contemporary career management. Much of this analysis will involve data that was collected through the questionnaire survey. Comments received in this survey will provide an insight into the current awareness and attitudes of eligibles with regard to their assessment of selection criteria.

The Trends. The significant trends that were a product of the 15 guidance letters are listed below in shortened form:

1. Potential
2. Equivalence of sea commands
3. Subspecialization
4. Youth
5. Defense Department participation

The first three have been in existence throughout the issuance of the guidance letters. The only change has been in the degree of emphasis. Equivalence of sea command and subspecialization continue to receive heavy emphasis in order to overcome the inertia of naval tradition in adopting new ideas.[1] Official recognition of the subspecialization trend came to fruition in 1965. This provided the appropriate coding of all officers with subspecialties that were gained by education, experience, or both. This coding provided a practical means of detailing personnel with applicable skills to repeated tours of duty in their subspecialty.

Implication of Trends on Career Management. What is the effect of these trends on career management for an officer aspiring to flag rank--future eligibles? The shift is in the area of recognition. There are essentially no esoteric or glamorous skills required of the unrestricted line officer. He must possess the traditional executive traits. These must be refined and honed to use the newly defined management skills, i.e., systems analysis, cost effectiveness, et cetera. "McNamara Management" does not require a naval officer of unique qualities to understand and apply his concepts. The observations made by the Hartman Board in 1948 concerning the acquisition of new weaponry expertise is equally valid when applied to the new management skills.

> . . . new weapons either produce or tend to produce dominant groups of officers. During the 19th century the advent of steam engineering and the iron clad . . . the torpedo boat threatened the battle line. . . . From 1920 to 1940 the "gun club" . . .. Now aviation . . . submarines, . . . in the future . . . guided missiles, atomic energy or whatever else science introduces as a new weapon. The importance of each new weapon, if only because it is new, gives prestige to the officers skilled in its use that acts as an incentive for that group to seek special privilege, authority and autonomy. This is natural and normal . . . incumbent that the Navy establish a training and educational system which . . . emphasizes . . . importance of high command relative to any speciality . . . insure an opportunity for a nonspecialist to acquire knowledge of the new weapon. . . .[2]

What has changed, then, is the professional environment for the observation of desired flag officer qualities. As the trends have shown, the environment has come ashore.

Centroid Theory--Defense Department Participation. The "sea to shore" environmental shift gives rise to this author's theory. Until about 13 years ago the preeminence of command at sea performance was unchallenged. By tradition it was in this environment where the naval officer could demonstrate those qualities that identified him as flag officer potential.[3] Duty ashore provided the opportunity to inject some "salt" into the Shore Establishment and

to continue to stress that the mission of the Shore Establishment was indeed to support the Fleet. Thus, the centroid for the naval officer was primarily a sea environment. His performance ashore obviously had meaning and thrust, but it could not compare with his command at sea.

Size, centralization, and technology have altered this former concept. These three factors have formed a background for the evolutionary shift of emphasis from sea to shore.[4] The effect of this evolution on the naval officer has been primarily a decreased emphasis on sea duty and an increased emphasis of duty within the high visibility of the Washington arena. However, to gain admission to this arena the traditional seagoing qualities must be met. This admission is in the form of completion of standard afloat duties which will permit entry to the Washington scene. The standard afloat duties are outlined in the *Officer Fact Book* in the form of "Professional Development Pattern for Code——." These patterns contain the appropriate sea and shore billets as a function of grade and, of course, the officer code (surface line, submariner, aviator, et cetera).[5] Obviously these traditional naval officer duties are still required; however, they are now merely a prerequisite for entry into the most important environment for performance evaluation--the Washington environment.

This centroid concept has significant implication in career management for future eligibles. A most important consideration is obtaining the Washington jobs that provide an opportunity to build and project a desirable image. Should an officer orient himself principally towards afloat jobs, both staff and command, he will have difficulty in obtaining the high visibility Washington job. Thus, an officer who has approached his career planning from the traditional viewpoint of the paramountcy of command at sea may lack the prerequisites to compete for the good visibility assignment, and, like time, the prerequisites are irretrievable. Therefore, the career-motivated officer must be cognizant of the current prerequisites for admission to the visibility arena. This fulfillment of the requisites has been eased by the "equivalence of sea commands" trend which stated that the requirements for a deep draft or major command may be satisfied in many ways, i.e., a smaller unit, a squadron command, et cetera. In addition, the requirement of a finite amount of sea duty for promotion was abolished 8 April 1964 by Executive Order 11157. Conversely, the requirement for duty on a joint or international staff or agency has not received the same equivalence. Therefore, it has been presented as practically a "sine qua non" for selection to flag rank.

It is apparent that once an officer has fulfilled the minimum sea duty requirements within each grade, he should seek all his shore duty in the Washington arena. The earlier in his career he obtains this Washington duty, the more Defense Department management ability and expertise he will acquire. At the rank of captain this will enhance assignment to the prestige jobs in Washington that offer high visibility necessary for promotion to flag rank.

Subspecialization Trend. The requirement for line officers to acquire a specialization was officially documented in 1919 in the Knox-King-Pye Board Report which said in part:

> . . . provision must . . . be made . . . for the specialization of all officers in at least one branch of the profession, in order to insure that full knowledge and use may be made of the constant progress in all of the arts, industries, and sciences, which can in any way contribute to the advancement of efficiency in naval warfare in any of its manifold aspects and requirements. Some of this specialization can be accomplished by instruction and some of it by suitable assignments to duty.[6]

As noted previously, official implementation of this trend occurred in 1965 with the approval of the 1964 Combs Board Report. The SecNav guidance letters have also stressed this subspecialization almost continuously since 1955. However, the unrestricted line officer corps has not embraced the subspecialization concept. This fact was pinpointed in the 1962 Dillon Report which was a Review of the Management of the Department of the Navy with the following statement:

> Navy career patterns are not always designed to meet the future needs of increased specialization. Many of our personnel who have the basic qualities for successful technical careers are not sufficiently motivated to pursue such careers. There is no longer a sufficiently attractive appeal for officers to obtain a postgraduate technical education. The view that tours of duty in key technical positions in bureaus and shore activities adversely affect promotional opportunities to flag rank is widely held among officers. These problems are most serious.[7]

What effect does the present implementation of a subspecialization program have on future eligibles? First, it will utilize the technical postgraduate training that perhaps had not been applied in the appropriate field. Second, it will stimulate increased attendance in the technical academic areas. Third, an officer with an identified subspeciality, having previously avoided assignment in the applicable technical billets (as the Dillon Report indicated) would find himself at a disadvantage in comparison to those officers who had utilized their technical subspecialties. It would appear that in the light of present policy, future eligibles will be criticized if they do not fulfill and seek billets that involve their particular subspecialty.

Survey Questionnaire Information. The survey questionnaire was directed towards the future eligibles (captains) for selection to unrestricted line rear admiral and the unrestricted line rear admirals and vice admirals.

The population sampled was 2,273 and 220 respectively. Three hundred and fifteen surveys were mailed to the captains (13.3 percent of the population) and 35 mailed to the admirals (15.9 percent of the population). The names of the captains were randomly selected by the Bureau of Naval Personnel and the names of the admirals were randomly selected by the author. There were 236 captain responses and 29 admiral responses. This represented a return of 75 percent for the captains and 82.8 percent for the admirals for an overall return of 75.6 percent.

The discussion of the survey contained in this section will be limited to:

	CAPTAINS		ADMIRALS	
	#	*	#	*
SecNav Guidance Letters to Selection Board	161		19	
Conversations with Senior Officers	86		2	
Information promulgated by the Bureau of Personnel	63		5	
Personal observations	52		10	
Review the records of those selected	48		7	
No sources of information	12		1	
Pride Board Report	2		0	
Title 10, *U.S. Code*	0		1	

*No percentages may be determined since those responding indicated on this question from one to n+1 sources. It is notable that all responding answered this question.

1. The current awareness and attitudes of what the selection criteria are, and

2. Comments concerning the sea to shore subspecialization trends.

Selection Criteria. Both captains and admirals were asked what, if any, were the sources of information regarding the selection to flag officer. As the table above indicates, the vast majority (captains 161 and admirals 19) noted that the SecNav guidance letters were the primary source. It is interesting to note that there were only two references to the Pride Board Report, which has been the only official report that addressed itself to the question of flag officer selection criteria.[8]

The question dealing directly with a determination of the criteria asked, "What do you understand to be the current criteria for selection to flag officer?"

As the below table shows, the trait of performance was noted more often both by captains and admirals than any other criterion. Yet this trait had not been stressed by SecNav since 1960. The companion trait, potential, has been heavily stressed by SecNav from 1960 on, yet it was noted only 32 times by captains and seven times by admirals. The two factors of duty in Washington and duty on a joint and international staff and agencies were next in order of preference for the captains. This was in accord with the guidance letters, particularly those which Mr. Nitze authored. With regard to Secretary Nitze, captain respondent no. 20 made an observation which appeared to be typical:

> I think the policies and selection criteria changed when Mr. Nitze became SecNav. I think he's the finest we've ever had but as a highly educated and erudite civilian, does not have an

	CAPTAINS		ADMIRALS	
	#	*	#	*
Performance	128		10	
Washington, D.C. duty	84		4	
Duty on a joint and international staff and agencies	60		1	
Well rounded career	56		10	
Attaining a subspecialty	46		4	
Excellence in command at sea	44		1	
Major command	43		0	
Deep draft command	15		0	
Youth	37		1	
Potential	32		7	
Education	30		0	
Sponsor/"Friends"	28		1	
Skilled naval executive	21		1	
Unknown	16		1	
Service college attendance	14		1	
Articulate in oral and written communications	13		0	
Previous SacNav Guidance Letter	11		7	

*No percentages may be determined since those responding indicated on this question from one to n+1 criteria. It is notable that all responding answered this question.

> appreciation for the responsibilities, preparations, and requirements for command at sea.

In addition to the performance-potential difference, the other most significant difference between the guidance letters and the survey was in the area of proficiency at sea. The factors of excellence in command at sea and deep draft/major command required received an above-average number of votes from the captains (102) but only a scant one vote from the admirals. This difference in outlook between the captains and admirals was further demonstrated, as the table below indicates, when 64.4 percent of the captains and 37.9 percent of the admirals said a "major command" should be a mandatory prerequisite for flag selection.

	CAPTAINS		ADMIRALS	
	#	%	#	%
Yes	152	64.41	11	37.9
No	76	32.2	16	55.2
No response	8	3.39	2	6.9
TOTAL	236	100.0%	29	100.0%

The initial and one of the continuing purposes of the guidance letters has been to stress that a deep draft/major command is not mandatory and, additionally, that the importance of command at sea has diminished. This was illustrated by the statement of admiral respondent no. 25:

> [The] Battleship is dead! Its philosophy still persists that in order to command a fleet one must first have a major combatant ship to handle many ships. NOT so.

As previously noted, the preponderance of both captains and admirals indicated the primary source of selection criteria was the SecNav guidance letters. And, furthermore, when asked if they read guidance letters, 94.4 percent of the captains and 96.6 percent of the admirals said they did, as the table below shows. Yet, there is a difference between the criteria delineated by the

	CAPTAINS		ADMIRALS	
	#	%	#	%
Yes	223	94.49	28	96.6
No	13	5.51	1	3.4
No response	0	0	0	0
TOTAL	236	100.0%	29	100.0%

respondents and that covered in the guidance letters. This was overwhelmingly true in the captains and only moderately true within the admiral respondents. One rationale for this "criteria lag" may be attributed to the reluctance to accept a "Real Time" orientation of present Defense Department management policy due to a clinging traditionalism of the battleship days. The reverse of this school of thought and a realization of the significance of the guidance letters were borne out by the statement given by admiral respondent no. 17:

> I think we all must remember that the nation–and thus the Navy–is undergoing rapid social and technological changes. Flag selection must change also–and the Secretary's annual precept letter [guidance letter] to the President of the Board should remain the source of guidance and policy leadership.

Sea Duty to Washington Trend. The survey showed concurrence with the guidance letters in the trend of increasing importance of Defense Department participation (duty in Washington) and a lessening of importance of sea duty. In response to the question, "If a captain is preparing for selection to flag officer, in which area would a 'head and shoulder' performance carry the most weight?," as shown below, 69.9 percent of the captains and 62.14 percent of the admirals selected the Washington area.

Naval War College Review, Vol. 22 [1969], No. 1, Art. 1

	CAPTAINS		ADMIRALS	
	#	%	#	%
Washington area	165	69.92	18	62.14
Command at sea	22	9.33	4	13.76
Both*	37	15.66	6	20.65
No response	12	5.09	1	3.45
TOTAL	236	100.0%	29	100.0%

*This category was a write-in.

Admiral respondent no. 8 illustrated the former with the following "high visibility" philosophy, "command still [is] a most significant factor, but Washington duty is the showcase for displaying your wares." Captain respondent no. 17 further expanded on this point:

> Washington duty is becoming increasingly important, especially billets associated with various aspects of the new defense management techniques or billets with a "high degree of visibility," in which the officer is seen by and performs for the higher ranking admirals and/or civilian Secretariate.

With regard to the importance of sea duty, the following was asked, "Do you feel that the traditional command at sea concept has been lessened in its impact?"

	CAPTAINS		ADMIRALS	
	#	%	#	%
Yes	175	74.21	22	75.9
No	59	24.94	5	17.2
No response	2	0.85	2	6.9
TOTAL	236	100.0%	29	100.0%

As indicated in the above table, 74.2 percent of the captains and 75.9 percent of the admirals agreed. The prevalent feeling of those disagreeing with this question is displayed by captain respondent no. 27:

> The senior uniformed echelon must insure that qualification and demonstrated outstanding ability as a seagoing Naval Officer in the tactical control and day-to-day operation of Naval ships continues to be recognized as a primary requirement of a line officer and a skill (art? talent?) that stands on its own merit and requires many years to develop to its full meaning. If this is lost the Navy will cease to be the effective organization it is today.

Captain respondent no. 29 made the following rationale for the lessening of importance of command at sea:

> An officer's performance at sea in command is far less a measurable quantity than is a tough shore billet simply by virtue of relatively little opportunity for surveillance by the reporting senior. By doing a few things well, others not at all, and avoiding trouble you can complete the successful sea tour.

Finally, captain respondent no. 197 presented the following views and reasoning for the decline of significance of command at sea:

> I find the shift in emphasis from 'command at sea' to 'management effectiveness' both realistic and proper. Our long standing (and perhaps exaggerated) philosophy that commanding a ship is the only comprehensive training ground for future Flag Officers is slowly giving way to overdue recognition that certain management assignments are at least as challenging and certainly more useful in preparing officers for similar Flag Officer billets. The increasing complexity of ships and tactics has been evolutionary in nature and most line officers can deal competently with progressive improvements in hardware and systems--experience and energy are the principal requirements. Changes in management responsibilities, however, have been profound and have demanded the highest order of broad imagination and adaptability.

> In short, both command and management skills are essential Flag Officer ingredients but, since the latter quality is currently in shortest supply, it is likely to be weighted more heavily until naval officers become as facile and confident in management roles as they are in ship handling and operations.
>
> Let us now force this evolution, however, by artificial detailing policies which will give all officers a chance at a multitude of assignments, at the expense of uniformly weakening our already low standing in the area of management. A mediocre officer in command of a ship can lower the combat effectiveness of that ship but the same officer, in certain management or strategic policy making positions, can disrupt the Navy and hazard the Nation.

Subspecialization. Evidence of the increased emphasis on subspecialization is implicit in an examination of the advanced training of the respondents as the following table shows:

	CAPTAINS		ADMIRALS	
	#	%	#	%
M.S./M.A.	72	30.5	4	13.8
LL.B	6	2.54	0	0
Ph.D	2	.84	0	0
No advanced Degree	142	60.2	25	86.2
No response	14	5.92	0	0
TOTAL	236	100.0%	29	100.0%

Nearly three times the number of captains, 33.8 percent have advanced degrees as compared to 13.8 percent of the admirals. With regard to attaining a subspecialty, admiral respondent no. 3 made the following comment:

> Now a Captain has only the need to demonstrate that he is a capable or qualified Commanding Officer. After this, selection depends on his future use to the Navy–which means specialization and subspecialization.

The traditional concept of attaining any subspecialty was voiced by admiral respondent no. 22:

> Pragmatically speaking, advanced education, particularly in a specialty, is a handicap since a feeling exists that a specialist 'owes' the Navy several tours of duty in his specialty, which usually will conflict with good career planning.

This attitude was outlined even more explicitly by captain respondent no. 175:

> The major weakness of the selection system--and this is applicable to all ranks--is that as soon as an officer has had sufficient experience in a particular field to become a valuable 'specialist,' he is dead as far as promotion is concerned. Regardless of what the Secretary's guidance letter says, the Board has over the years tended to concentrate in its selection on those who are not 'specialists' or 'experts' in a particular field.

Finally, captain respondent no. 234 aptly summarized the attitude that Secretary Nitze has been desirous of achieving within the Flag Selection Boards: "Flag selection must permit selection within certain specialty areas to permit successful prosecution of Navy programs."

General Comments on Questionnaire. The previous statements from the various respondents were gleaned from the prolific comments made to the last question on the questionnaire which stated: "Please place below any comments you would like to make regarding selection criteria and policies." The number of respondents making comments on this question was most gratifying: 200 captains and 25 admirals, which was 84.7 percent and 86.4 percent respectively of all those responding. Unfortunately, these numbers preclude any compilation of the comments into a separate appendix. However, the statements used in this chapter were selected to reflect the more consistent response within the particular question or area that was examined.

IV--CONCLUSIONS

Guidance Letters. The guidance letters written by the Secretary of the Navy to the president of the selection board from 1953 to 1966 contain some guidance and criteria for selection to flag rank. These letters prior to and since their inception in 1953 are the only continuing source of criteria for selection to flag officer. This criteria for analysis purposes was arbitrarily divided into categories:

1. Personality traits, and
2. Factors that deal either with duty assignments or with general career policy guidance.

In the delineation of the criteria dealing with the vast majority of the personality traits, the letters are necessarily vague and platitudinous. The traits are those that traditionally apply to top management--civilian or military--and are recorded in a variety of available documents. They are also the same traits that had substance and thrust in John Paul Jones' day and still do today. The two traits that do exhibit trends are potential and youth. Potential has been in existence in the letters since 1954; only the emphasis has altered. Secretary Nitze initiated the youth trend in 1964 and has stressed it each succeeding year. The criteria dealing with factors have produced three noteworthy trends: equivalence of sea command, subspecialization and a quantum jump in increased Defense Department participation. The implications of these five trends are an increase in importance of Defense Department participation (Washington duty), a lessening of importance of command at sea, and, finally, a new appreciation and vigorous utilization of subspecialty skills.

The thrust of the foregoing on individual career management gives rise to the centroid theory and a new appreciation of subspecialties. Command at sea performance has traditonally been the high visibility area. However, with the advent of the Defense Department participation trend, performance in Washington has preempted command at sea as the high visibility environment. Therefore, successful completion of required command at sea billets now serves as the entrance requirements to the Washington arena. Thus, career-wise, after an officer has fulfilled his minimum sea duty requirements in each particular grade, he should actively seek Washington duty. The earlier in his career he obtains this Washington duty the more Defense Department management ability and expertise he will acquire. This, at the captain plateau, will enhance assignment to the prestige jobs in Washington that offer high visibility. The new appreciation of subspecialties will prompt the following career management moves:

1. An increased stimulus to obtain technical academic training, and
2. An active seeking of billets to utilize existing identified subspecialty skills.

BIOGRAPHIC SUMMARY

Lt. Comdr. Thomas R.M. Emery, U.S. Navy, is a graduate of the U.S. Naval Academy, holds a degree in electrical engineering from the Naval Postgraduate School in Monterey and an M.S. in International Affairs from The George Washington University. He has served as Engineering Officer of U.S.S. *Cotton* (DD 669), as Flag Lieutenant and Aide to Commander Cruiser Division ONE, as Executive Officer of U.S.S. *Lorain County* (LST 1177), as commissioning Weapons Officer of U.S.S. *Richard E. Byrd* (DDG 23), as Executive Officer of U.S.S. *Sampson* (DDG 10), and is presently Commanding Officer, U.S.S. *Hartley* (DE 1029). He graduated from the School of Naval Command and Staff, Naval War College, Class of 1967.

Survey Questionuaire. The guidance letters provide the overwhelming source to both captains and admirals for selection criteria. The vast majority, 94.4 percent of the captains and 96.6 percent of the admirals, said they read the guidance letters. However, there was a marked deviation between the criteria delineated by these respondents and that covered in the guidance letters. This deviation was considerably more evident with the captains. The areas of most significant disagreement with the guidance letters was too much emphasis on performance and the requirement for major command and too little emphasis on potential. However, the respondents did agree on the rising importance of Washington duty and an overall lessening of importance of command at sea. This is somewhat at variance with the feeling towards the major command question and can perhaps be attributed to the reluctance to accept an erosion of the last and most significant embodiment of the seagoing naval officer--command of the major combatant ship.

Recommendations. The discrepancy between the officers' assessment of selection criteria and the actual selection criteria indicates a number of officers tend to place themselves in positions where their experience and expertise were not being utilized nor noticed to the maximum. It appears that more attention should be given to communicating the criteria so that officers could effectively plan and implement their career objectives. To this end the guidance letters as presently constituted should be modified. In their stead the Secretary should initiate management directives that relate selection criteria and/or policy. These directives should be written on a yearly basis and, in addition to containing the guidance for selection, should assess and identify present and future trends in the Navy and projected policy for these trends. These directives should be given wide official distribution, i.e., *The Officer Personnel Newsletter*, SECNAV Instructions, et cetera, to afford availability to all levels within the officer structure.

Epilog. The question that has been implicit throughout the discussion of selection criteria and its effect on career management is, "What can any officer do to enhance his selection to flag rank?" The answer to this was either implied, addressed, or sidestepped in the voluminous comments contained in the survey questionnaire. Obviously, there is no one answer--there are many. One philosophical approach outlined by captain respondent no. 15 appeared to this author to be an apt and realistic assessment of the question:

> Since there is an excess of potential flag performers over those selected, the nod goes to those whose backgrounds and capabilities most nearly match service needs at the time. Of course, some officers have frustrated, outsmarted, or even embittered themselves by failing to realize (or realizing too late) that service needs can shift more quickly than individuals can adjust career patterns. The element of chance is inescapable.
>
> So, what is the role for the individual officer? It should be the utmost development of his unique capabilities. He may then hope, but not naively expect, that a demand for his capabilities will exist at selection time. A flaw in many contemporary attitudes towards flag selection is the assumption of a single career model and that the 'prize' goes to the closest approximation to this ideal. In my opinion, the role of the Navy in this era has become so complex and sophisticated that the widest range of individual capabilities should be found among the flag officers of the Navy.

FOOTNOTES

INTRODUCTION

1. U.S. Dept. of the Navy, *Selecting Executives*, NAVEXOS P-2255 (Washington: 1960), foreword.
2. *Ibid.*, p. 2.

I--THE NAVAL SELECTION SYSTEM

1. Charles Miller, *Admiral Number One* (New York: William-Frederick, 1962), p. 23.
2. *Ibid.*, p. 19.
3. *Ibid.*, p. 24.
4. U.S. Dept. of the Navy, *Report of the Secretary of the Navy, 1862* (Washington: U.S. Govt. Print. Off., 1862), p. 40.
5. Loyall Farragut, *The Life of David Glasgow Farragut* (New York: Appleton, 1879), p. 485.
6. Donald Mitchell, *History of the Modern American Navy* (New York: Knopf, 1946), p. 5.
7. William Sims, "Promotion by Selection," *United States Naval Institute Proceedings*, May 1934, p. 769.
8. *Ibid.*
9. Fletcher Pratt, *The Compact History of the U.S. Navy* (New York: Hawthorn Books, 1962), p. 197.
10. U.S. Laws, Statutes, etc. *Naval Service Appropriations*, Public Law 64-241, 64th Congress (Washington: U.S. Govt. Print. Off., 1917), v. XXXIX, pt. 1, p. 556-619.
11. U.S. Dept. of the Navy, *Criteria for Selection to Flag Rank in the Navy*, SecNavNotice 1412 of 1 May 1963 (Washington: 1963).

II--ANALYSIS OF CRITERIA AND TRENDS

1. Harold Koontz and Cyril O'Donnel, *Principles of Management* (New York: McGraw-Hill, 1955), p. 26.
2. *Ibid.*, p. 27.
3. U.S. Dept. of the Air Force, *The Management Process* AFM 25-1 (Washington: 1954), p. 91.
4. U.S. Industrial College of the Armed Forces, *The Department of Defense Management Revolution: Causes and Effects*, by J.S. Smith (Washington, U.S. Govt. Print. Off., 1964), p. 12.
5. Letter from SecNav Paul H. Nitze to Admiral John H. Tach, USN, 21 September 1965, p. 3.
6. Letter from SecNav Fred Korth to Admiral James S. Russell, USN, 7 May 1963, p. 1.
7. Alain C. Enthoven, "Choosing Strategies and Selecting Weapons Systems," *United States Naval Institute Proceedings*, January 1964, p. 152.
8. Letter from SecNav Paul H. Nitze to Admiral Horacio Rivero, USN, 7 May 1966, p. 3.
9. Letter from SecNav Charles S. Thomas to Admiral Jerauld Wright, USN, 29 June 1955, p. 3.
10. "The Defense Systems Analysis Education Program," *Naval Training Bulletin*, Summer 1966, p. 1.
11. U.S. Dept. of the Navy, *Criteria for Selection to Flag Rank in the Navy*, p. 3.
12. Leland Lovette, *Naval Customs Traditions and Usage* (Annapolis, Maryland: U.S. Naval Institute, 1939), p. 372.
13. Koontz and O'Donnel, p. 24.

III--EFFECTS OF TRENDS ON CAREER MANAGEMENT

1. U.S. Industrial College of the Armed Forces, *The Economics of National Security: Organization for National Security* by Harry Yoshpe and Stanley L. Falk (Washington: U.S. Govt. Print. Off., 1963), p. 72-75.
2. U.S. Dept. of the Navy, *Hartman Board Report*, B-3406 (Washington: 1948), p. B-2406-13.

3. "Report and Recommendations of a Board Appointed by the Bureau of Navigation Regarding the Instruction and Training of Line Officers," (Knox-King-Pye Board Report) *United States Naval Institute Proceedings*, August 1920, p. 1265-1292.

4. Morris Janowitz and Roger Little, *Sociology and the Military Establishment* (New York: Russell Sage Foundation, 1965), p. 23-24.

5. U.S. Dept. of the Navy, *Officer Fact Book*, p. 8-15--8-26.

6. Knox-King-Pye Board Report, p. 1269.

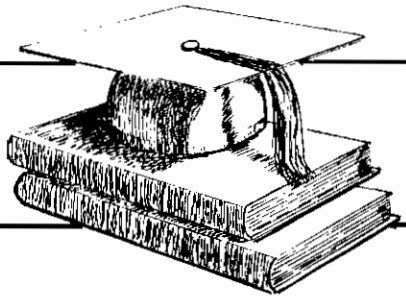
7. U.S. Dept. of the Navy, *Review of Management of the Department of the Navy*, NAVEXOS P-2426B (Washington: 1962), p. 9.

8. U.S. Dept. of the Navy, *Criteria for Selection to Flag Rank in the Navy*, SECNAV Notice 1412 of 1 May 1963 (Washington: 1963).

ψ

There is a great deal of talk about loyalty from the bottom to the top. Loyalty from the top down is even more necessary and much less prevalent.

George S. Patton, Jr.: War As I Knew It, 1947



PROFESSIONAL READING

The evaluations of recent books listed in this section have been prepared for the use of resident students. Officers in the fleet and elsewhere may find these books of interest in their professional reading.

The inclusion of a book in this section does not necessarily constitute an endorsement by the Naval War College of the facts, opinions or concepts contained therein.

Many of these publications may be found in ship and station libraries. Certain of the books on the list which are not available from these sources may be available from one of the Navy's Auxiliary Library Service Collections. These collections of books are obtainable on loan. Requests from individual officers to borrow books from an Auxiliary Library Service Collection should be addressed to the nearest of the following special loan collections.

Chief of Naval Personnel (C-463)
Department of the Navy
Washington, D.C. 20370

Commanding Officer
U.S. Naval Station (Guam)
Library (ALSC), Box 174
San Francisco, Calif. 96630

Commanding Officer
U.S. Naval Station (Pearl Harbor)
Library (ALSC), Box 20
San Francisco, Calif. 96610

Commanding Officer
U.S. Naval Station
Library (ALSC), Bldg. C-9
Norfolk, Virginia 23511

Commanding Officer
U.S. Naval Station
Library (ALSC)
San Diego, Calif. 92136

Georgetown University. *The Soviet Military Technological Challenge.* Washington: 1967. 98 p.

This book is the sixth in the Special Report Series of the Center for Strategic Studies. The main thrust of the publication is that the gap between United States and Soviet military science and technology is rapidly closing. The Russians have recognized the need for a strong military-technological base. A brief and informative history of the remarkable Soviet progress in building an advanced scientific and technological base is presented to illustrate the point. Examples of Soviet resource utilization are also presented. Soviet technological developments cover the entire spectrum of military weapon systems, but the tendency has been to concentrate in high payoff areas such as nuclear weapons and advanced weapon delivery systems. Potential areas of Soviet technological efforts in the 1970 time frame are forecast. The critical element in the maintenance of an acceptable American military posture will remain the degree of technological advantage which the United States maintains over the U.S.S.R. Higher research and development expenditures as well as the procurement and development of advanced weapon systems are vital if the United States is to meet the challenge now being imposed by the continuing growth of Soviet scientific and technological capabilities. Although no new or startling concepts are presented, this book contains a brief and interesting examination of the role and importance of

science and technology in the protracted conflict environment.

G.L. SUMMERS
Commander, U.S. Navy

McNamara, Robert S. *The Essence of Security*. New York: Harper & Row, 1968. 176 p.

The author's stated objective in this brief work is an exposition of principles and philosophy he employed in directing the activities of the Defense Establishment. This has been accomplished with the brevity, clarity, and directness expected of Mr. McNamara.

The organizational framework of this book reflects both his conceptual attitude toward national security and the Department of Defense (DOD) under his directorship. U.S. security is viewed as an integration of three broad areas. The first area of consideration is the contemporary world and the abrasive interests of the chief adversaries. This discussion presents little new or startling; it is a synopsis of conflicting interests in Southeast Asia, the Middle East, South America, and an expression of deep concern over an inadequately trained mobilization base for NATO. It is apparent that Mr. McNamara views Europe as having primary claim on U.S. military resources.

In the second part of his work--The Tools of Power--the author makes a case for mutual deterrence. He exposes the folly of serious United States-Soviet ABM competition and supports realistic strategic arms limitations agreements in what he calls a "race toward reasonableness." Mr. McNamara substantiates the logic in which the shift from the 50-megaton syndrome to a strategy of flexible response, especially in support of commitments to other countries, was founded. He closes his arguments in this part with a discussion of the innovations that have taken place in the management of the DOD during his tenure as Secretary. These include his concept of analyzing weapons programs, force requirements, military strategy, and foreign policy as a rationale for the development of the annual 5-year defense force structure. This reviewer might add, parenthetically, that the author has opted to emphasize his successes in applied management and overlooked those projects that have yet to earn this description, e.g., the F-111.

In part three Mr. McNamara opens with an observation on "gaps and bridges" in which he identifies the technological gap in Europe as being primarily managerial and makes the point that the basic problem is one of education. The Europeans are taken to task for failing to meet their broad educational needs. The United States, he chastises similarly for neglecting the education of its underprivileged. He cites projects that the DOD has initiated to assist in filling the U.S. gap, noting that while social progress is not a primary DOD responsibility the foundation of security is a stable social structure, and DOD should contribute where feasible. This philosophy is extended to the international scene in the author's closing words, "Just as collective security is the only sensible military strategy in a half-free and half-totalitarian world, so collective developmental assistance is the only sensible economic strategy in a half-fed and half-furnished world. Collective security and collective development are but two faces of the same coin." The implication is that as a rich nation we are not indebted to the poor nations, but we owe it to ourselves to see that the developing needs of these less developed countries are met.

This reviewer suggests that every U.S. military officer "owes it to himself" to read this brief trilogy on national security, regardless of individual characterization of Mr. McNamara as Secretary of Defense. The message rests both in the substance of the work and the perspective of the author.

R.M. LASKE
Commander, U.S. Navy

Middleton, Drew. *America's Stake in Asia.* Philadelphia: Lippincott, 1968. 240 p.

Drew Middleton, in his Introduction, states:

> To show what Americans are doing in Asia, what the Asians themselves are doing, and to give some picture of the problems that face the continent are the purposes of this book. The opinions, of course, are my own. I am happy to say they bear no relation to those of the editorial page of *The New York Times.*

It was this last statement that interested the reviewer sufficiently to select this book for evaluation. Within the limits of the above stated purpose, Mr. Middleton has succeeded admirably in considering problems and prospects throughout the area. He discusses Japan, Vietnam, Laos, Malaysia, Thailand, Singapore, Burma, India, Pakistan, Iran, Afghanistan, the Philippines, and Indonesia. Some get relatively brief treatment, and others receive more thorough examination. There is no statement on Formosa. Although no chapter is devoted specifically to Communist China, her influence and threat are always considered.

The author's thesis is that the United States is involved in Asia whether she likes it or not; hence, it is not so much a question as to why she is involved as it is of what she will do there. The main problems are, on the one hand, the constantly increasing numbers of people and how to supply their food requirements, and, on the other hand, the threat that Communist China poses. Mr. Middleton sees the latter as the principal danger--one that can be greatly increased if the first is not solved. He reviews the traditional Maoist theory of using rural bases to encircle cities and then projects this to a global basis, wherein Western Europe and North America may be considered as the cities, while Latin America, Africa, and Asia are the rural areas. Of course, the United States is now actively engaged in Asia. To thwart Chinese designs, the author advocates that first, America must prevent a North Vietnamese victory and then must improve economies in the Asian area to the point where governments and people are in a position to resist Chinese subversion. A major hazard appears to be an American isolationist sentiment toward Asia. Mr. Middleton submits that the United States, almost by default, is the only nation that can be of significant help and that she should be selective in her assistance and in the governments to which her aid should be extended, and not offer across-the-board assistance to any and all. Also of critical concern in that portion of the world is the Kashmir issue, which the author maintains has the potential for disaster in Asia. The United States, if only in her own interest, must make sincere efforts to resolve this problem. The book is well written, informative, and valuable to an understanding of U.S. interests in Asia. Mr. Middleton has indeed taken a stand apart from the editorial page of *The New York Times.*

B.V. AJEMIAN
Captain, U.S. Navy

Robinson, Donald B., comp. *The Dirty Wars; Guerrilla Actions and Other Forms of Unconventional Warfare.* New York: Delacorte Press, 1968. 356 p.

This collection of articles, dispatches, and essays presents a solid source of material on guerrilla warfare and those involved in the suffering, heartbreak, successes, and failures of this most difficult and dirty form of fighting. There are no dry theories here, no charts, nor statistics. In compiling this volume, Donald Robinson has drawn no definitive limit as to what constitutes guerrilla and unconventional war. He obviously knows his subject well enough to understand that varied environments, political situations, and human attitudes tend to defy definition and that the

outer fringe of an obvious insurrection is often where the significant action can be found.

From Europe to Africa, from the Middle East to Latin America and Asia, the reader can monitor the painfully dated but pertinent bulletins of the Free Hungarian radio stations in October of 1956; accompany Algerian rebels on an operation; hear the Jordanian side of the border skirmishing with Israel; accompany mercenaries on a "Rabbit Hunt" in the Congo; peruse the diary of a North Vietnamese infiltrator; and learn the background of Trujillo's abortive attempt to assassinate President Betancourt of Venezuela. Joseph Kraft, Ramon Magsaysay, Arthur Campbell, Conor Cruise O'Brien, Arnaud de Borchgrave, Roger Hilsman, and Chairman Mao are among the contributors to this collection. Of particular interest is the introduction by Samuel L.A. Marshall. In addition to reviewing the first concern of postwar U.S. military leaders for the "grey areas" of Communist guerrilla activities, Marshall takes a close, hard look at Viet Cong prowess in guerrilla actions, separating truth from fiction. In his opening essay, "Thinking the Thinkable: Are We Beaten?" Donald Robinson projects a number of provocative ideas. "The fact is," he states at one point, "that guerrilla wars are not won by the big battalions; they are fought best by small units, well-motivated and well-trained. When you have to outnumber guerrillas ten or twenty to one, you are doing things wrong."

This book is part of the required reading for the fall elective "The Guerrilla and His World." It is recommended to all interested in the "dirty wars."

H.K. SIMPSON
Faculty Adviser and Consultant

Ward Barbara. *The Lopsided World.* New York: Norton, 1968. 126 p.

Barbara Ward (Lady Jackson) needs no introduction to the professional reader. She holds the distinction of being selected to deliver the first Christian A. Herter lecture series inaugurated in 1965 honoring the distinguished American who founded the Johns Hopkins School of Advanced International Studies.

The lecture series on the economics of plenty, the economics of privation, and the challenge of economic coexistence coupled with current updated material form the basis for her book called *The Lopsided World.* The author builds her thesis on the premise that a small number of states, equaling some 20 percent of the world's population, controls 80 percent of the world's wealth. It is not that the new nations do not grow, but while they walk ahead, the rich nations run. This gap has increased despite what she labels "North Atlantic modest efforts" to improve the situation. Lady Jackson draws upon history to show the problems encountered by wealthy nations in developing their economies throughout the years. She alludes to five critical points of change which are necessary fuel for sustained growth: the existence of a coherent and purposeful national sense; the training of minds in modern science, technology, and rational administration; the ability to produce savings; appropriate industrialization and the primacy of agriculture. They do not of themselves guarantee success. The machine must "take off" and also remain airborne. The question is whether or not other people's misery should be the concern of prosperous citizens. She holds that "the battle today is to convince the citizens who accept responsibility at home to accept it equally across the frontiers, across the lines of the map." Lady Jackson argues for a common shared humanity in which nations equal in self-determination come together to build a peaceful world where the barriers of exploitation and equality are discarded. The Western World has a

sense of responsibility and a moral obligation to further the progress of the lesser developed nations: "if the lopsidedness is to be reduced, the first need is to accelerate the processes of modernization and to apply to the poorer nations those methods and strategies which have proven themselves among the affluent." Although the author mentions national urban poverty in the ghettoes, many readers will undoubtedly take the position that the misery at home should be arrested prior to transcending boundaries for this purpose.

The book is well written and will provide the general reader with an excellent orientation on the foreign aid aspect of international relations. Following the text are appendices which classify countries according to gross national product and population, the flow of official aid, and exports: these may be of value for research purposes. *The Lopsided World* is recommended for the student of international relations.

M.D. BLIXT
Captain, U.S. Navy

Ψ

Napoleon directed Bourrienne to leave all his letters unopened for three weeks, and then observed with satisfaction how large a part of the correspondence had thus disposed of itself, and no longer required an answer.

R.W. Emerson: Representative Men, 1850

NAVAL WAR COLLEGE STAFF AND FACULTY

President	Vice Adm. R.G. Colbert, USN
Chief of Staff	Capt. E.B. Henry, Jr., USN
Aide to the President	Lt.(jg.) E.M. Hawkins, III, USNR
Public Affairs/Protocol Officer	LCdr. A.R. DeMarco, USN
Advisers to the President	
State Department Adviser	Ambassador T.S. Estes
U.S. Army Adviser	Col. W.F. Long, USA
U.S. Air Force Adviser	Col. G.F. Glick, USAF
U.S. Marine Corps Adviser	Col. T.C. Dutton, USMC
U.S. Coast Guard Adviser	Cdr. R.W. Durfey, USCG
Special Adviser for Development Program	Capt. A.J. Pickert, Jr., USN
Civilian Chairs and Consultants	
Alfred Theyer Mahan Chair of Maritime Strategy	Prof. F.H. Hartmann
Ernest J. King Chair of Maritime History	Prof. G.E. Wheeler
Chester W. Nimitz Chair of Social and Political Philosophy	Prof. B.M. Sapin
Charles H. Stockton Chair of International Law	Prof. R.B. Lillich
Chair of Physical Sciences	Prof. J.C. Aller
Stephen B. Luce Chair of Naval Science	Prof. E.L. Beach
Chair of Economics	Prof. P.L. Gamble
James V. Forrestal Chair of Military Management	Prof. E.B. Roberts
Milton E. Miles Chair of International Relations	Prof. A.C. Miller, Jr.
Faculty Adviser and Consultant (USIA)	Mr. H.R. Simpson
Coordinator of Research	Prof. E.R. Schwass
Academic Plans Department	
Assistant Chief of Staff for Plans and Director	Capt. C.D. Fonvielle, Jr., USN
Assistant Director	Capt. E.M. Porter, Jr., USN
Plans Officer	Cdr./LCdr. J.A. Barber, Jr., USN
Research Programs Officer	Col. N.M. Chapin, USA
Lecture Program Officer	Cdr. G.H. Winslow, USN
George Washington University, Naval War College Center	
Director	Prof. C.B. Sargent
	Prof. W.C. Hopkins
	Prof. G. Stambuk
Administration Department	
Director/Secretary, Naval War College	Capt. T.W. Lyons, USN
Asst. Director/Asst. Secretary	LCdr. E.L. Gregg, USN
Personnel Officer	Lt./Lt.(jg.) M.K. McMunn, USN
Security Officer	LCdr. J.B. Pleasants, USN
Registered Publications Officer	Lt. B.F. Berg, USN

School of Naval Warfare	
Director	Capt. R.E. Williams, USN
Asst. Director/Hd., Plans Division	Col. D.S. Hartley, Jr., USMC
Plans Officer	Capt. C.E. Neely, SC, USN
Air Force Adviser/Asst. Plans Officer	Col. H.J. Latimore, Jr., USAF
Army Adviser/Research/Electives Officer	Lt. Col. S.L. Barth, USA
Intelligence Officer	Cdr. R.C. Elder, USN
GSD Administrative Officer/Reserve Training Officer	Capt. B.M. Truitt, USN
Escort Officer	Ens. J.W. Elgin, USNR
Head, Sea Power and National Strategy Study	Capt. J.E. Godfrey, USN
Assistants	Col. W.S. Hathawey, USA
	Lt. Col. J.N. Leccetti, USAF
	Cdr. R.W. Durfey, USCG
	Cdr. D.E. Cerson, SC, USN
Head, Navel Warfare Study	Capt. B.V. Ajemian, USN
Assistants	Capt. W.H. Lowans, USN
	Cdr. C.G. Tate, USN
	Cdr. G.L. Summers, USN
	Cdr. H. Nemer, USN
Head, Strategic Planning Study	Col. D.L. Ward, USMC
Assistants	Capt. M.D. Blixt, USN
	Cdr. G.H. Kaffer, Jr., USN
	Lt. Col. J.D. Stevens, USAF
	Cdr. T.J. Guildey, Jr., USN
	Cdr. R.L. O'Neil, SC, USN
School of Naval Command and Staff	
Director	Capt. R.N. Miller, USN
Assistant Director	Capt. J.G. Boniface, USN
Plans Officer	Col. G.R. Hershey, USMC
	Cdr. M.E. Smith, USN
Assistent Plans end Escort Officer	Ens. T.V. Oliveri, USNR
Head, Team One	Cdr. D.A. Morton, CEC, USN
Assistants	Cdr. C.H. Nordhill, USN
	Cdr. R.A. Beaulieu, USN
	LCdr. D.D. Pizinger, USN
Head, Team Two	Cdr. E.H. Steentofte, USN
Assistants	Cdr. J.E. Gove, SC, USN
	Lt. Col. W.S. Pullar, Jr., USMC
	Cdr. H.C. Atwood, Jr., USN
	Cdr. J.E. Wessel, USN
	LCdr. W.W. Bigler, USN
	LCdr. H.B. Kuykendell, USN
	LCdr. S.L. Ritchie, USN
Head, Team Three	Lt. Col. D.L. Keller, USMC
Assistants	Cdr. D.J. Kershaw, USN
	Cdr. R.J. Hurley, USN
	Cdr. J.M. Quin, Jr., USN
	LCdr. R.P. Hanson, USN
Army Adviser	Lt. Col. L.J. Fitzgerald, USA
Air Force Adviser	Col./Lt. Col. J.W. Cotton, Jr., USAF
Research Program Officer	Cdr./LCdr. I.E.M. Donovan, USN
Asst. Research Progrem Officer	Ens. E.G. Collado, III, USNR
	Ens. R.A. Dooley, USNR
Naval Command Course	
Director	Capt. W.F. Chaires, USN
Assistant Director and Plans Officer	Capt. F.W. Ulbricht, USN
Head, Team ALFA	Capt. F.C. Gilmore, USN
Assistants	Cdr. R.L. Dodd, USN
	Cdr. J.F. McNulty, USN
	LCdr. H. Venezia, USN

Naval Command Course (cont'd)

Head, Team BRAVO	Cdr. C.H. Sell, USN
Assistants	Cdr. J.E. Arnold, USN
	Lt. Col. J.V. Cox, USMC
Operations Officer	Cdr. T.E. Lukas, USN
Administrative Officer	LCdr./Lt. L.R. Jacobs, USN
Escort Officer	Ens. P.W. Hanley, USNR

War Gaming Department

Director	Capt. C.H. Smith, USN
Assistant Director and Planning Officer	Capt. C.H. Price, USN
Head, Operations, Evaluation and Research Division	Cdr. D.W. DeCook, USN
Head, Evaluation and Research Branch	LCdr. J.M. Johnston, USN
Head, Gaming Development Branch	Cdr. G.E. Yeager, USN
Assistants	Cdr. R.D. Coogan, USN
	Cdr./LCdr. R.J.W. Smith, USN
	Cdr./LCdr. A.S. McLaren, USN
Head, Operations and Programming Branch	Cdr. W.E. Wilder, USN
Assistants	Cdr. R.A. Horan, USN
	LCdr. D.W. Somers, USN
	LCdr. R.J. Lamoureux, USN
Head, Engineering and Maintenance Division	Cdr. C.D. Bush, USN
Head, Maintenance Branch	Lt. B.G. Kear, USN

Correspondence School

Director	Col. T.C. Dutton, USMC
Head, International Affairs Division	Cdr. R.M. Laske, USN
Assistants	Dr. F.J. Flynn
	Mr. H.S. Noon
	LCdr. E.E. Hanson, USN
Head, Strategy and Tactics Division	Cdr. J.E. Woolway, USN
Assistants	LCdr. C.W. Cullen, USN
	LCdr. C.G. Felkins, USN
	LCdr. A.R. Grogan, SC, USN
Head, International Law Division	Cdr. R.J. Rogers, JAGC, USN
Assistant	Cdr. P.B. Walker, JAGC, USN
Head, Plans and Programs Division	Cdr. E.S. Harrison, USN

Ψ

Mahan was the only great naval writer who also possessed the mind of a statesman of the first class.

Theodore Roosevelt: in The Outlook
13 January 1915